91-261

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

U.S. COURT OF APPEALS
FIRST CIRCUIT (BOSTON)

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

v.

MASSACHUSETTS WATER RESOURCES AUTHORITY, *et al.*

May 15, 1991

On petition for rehearing en banc of 135 LRRM 2713. Petition granted, underlying order of the U.S. District Court for the District of Massachusetts reversed, and matter remanded.

See also 136 LRRM 2994.

Maurice Baskin (Carol Chandler, Mary L. Marshall, Stoneman, Chandler & Miller, Thomas J. Madden, and Venable, Baetjer, Howard & Civiletti, with him on briefs), for appellants.

James J. Kelley and John M. Stevens (E. Carl Uehlein, Jr., Morgan, Lewis & Bockius, Arthur G. Telegen, Foley Hoag & Eliot, Catherine L. Farrell, General Counsel, and Virginia S. Renick, Senior Staff Counsel, on joint brief for appellees Kaiser Engineers, Inc. and MWRA.

Donald J. Siegel (Mary T. Sullivan, Segal, Roitman & Coleman, Laurence J. Cohen, Victoria L. Bor, Sherman, Dunn, Cohen, Leifer & Yellig, Walter Kamiat, and

Laurence Gold, with him on briefs), for appellee Building and Construction Trades Council of the Metropolitan District.

Richard D. Wayne and Hinckley, Allen, Snyder & Comen, filed brief for Utility Contractors Association of New England, Inc., as amicus curiae.

Ralph F. Abbott, Jr., Jay M. Presser, and Skoler, Abbott & Presser, P.C., filed brief for National Association of Manufacturers, as amicus curiae.

Scott Harshbarger, Attorney General of Massachusetts and Douglas H. Wilkins, Assistant Attorney General, on supplemental brief for Commonwealth of Massachusetts, as amicus curiae.

Bond, Schoeneck & King, Sherburne, Powers & Needham, Raymond W. Murray, Robert W. Kopp, and Anthony E. Battelle, on brief for Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc., a Joint Venture, as amicus curiae.

Before CAMPBELL, TORRUELLA, SELYA, and CYR, Circuit Judges.

Full Text of Opinion

TORRUELLA, Circuit Judge:—Plaintiffs-Appellants Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC") appeal the decision of the United States District Court for the District of Massachusetts denying ABC's request for a preliminary injunction. For the reasons stated below, we reverse this decision and remand for action consistent with our opinion.

I. *THE FACTS*

The Massachusetts Water Resources Authority ("MWRA") is a governmental agency authorized by the Massachusetts legislature to provide water supply serv-

[1] Also its national association and five individual contractors.

ices, sewage collection, and treatment and disposal services for the eastern half of Massachusetts. Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, *United States v. Metropolitan District Commission*, C.A. No. 85-0489-MA (Mazzone, J.), the MWRA was ordered to meet a detailed timetable to carry out the clean-up of that body of water. This task, known as the Boston Harbor Clean-Up Project ("Project"), is estimated to involve $6.1 billion of public works over a ten year period. The means and methods of carrying out the Project are set forth in the MWRA's enabling statute, Mass. Gen. Laws ch. 92, app. §§ 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control and supervision over all aspects of this project.

In the spring of 1988, the MWRA retained Kaiser Engineers, Inc. ("Kaiser") as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor, or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work and other limited or emergency situations.

Another important function of Kaiser is to advise the MWRA on the development of a labor relations policy which will maintain worksite harmony, labor-management peace, and overall stability during the ten-year life of the Project. The MWRA had already experienced work stop-

pages and informational picketing at various sites[2] and was concerned that, because of the scale of the Project and the number of different craft skills involved, it was vulnerable to numerous delays thus placing the court-ordered schedule in jeopardy and subjecting the MWRA to possible contempt orders. This concern was enhanced by the geographic location of the existing and proposed treatment facilities which makes them vulnerable to picketing and other concerted activity.[3]

The above circumstances led Kaiser to recommend to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Building and Construction Council and affiliated labor organizations[4] ("Trades Council"), in an effort to arrive at an agreement which would assure labor stability over the life of the Project. Any agreement would be subject to review and final approval by the MWRA.

The MWRA accepted Kaiser's recommendations and in early May 1989 Kaiser proceeded to meet with negotiating teams from the unions, including the Trades Council. The Master Labor Agreement was the result of their negotiations. After review by the MWRA staff, and upon its recommendation, the MWRA Board of Directors on

[2] In November of 1988, two labor unions picketed the Project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site. This is a well recognized method of maintaining continuity of work in the construction industry. Other threats were made to disrupt the work, but no other significant disruption actually occurred.

[3] At Deer Island access to the site was by a single two-lane road passing through crowded Winthrop streets, and next to the existing Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Trades Council such as those representing maritime workers.

[4] Thirty-four in all.

May 28, 1989 adopted the Master Labor Agreement as the labor policy for the Project and directed that Specification 13.1 be added to the bid specification for all new construction work. Specification 13.1 provides that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ["the Master Labor Agreement"] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the [Trades Council] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract. A copy of the agreement is attached and included as part of these Contract Documents . . .

The Master Labor Agreement establishes as "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." It is the duty of Kaiser on behalf of MWRA to "monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto." The parties state the need to meet the "specified and limited time frames" established by the district court's order in the Boston Harbor Clean-up case. Also agreed to are binding methods for the settlement of "all misunderstandings, disputes or grievances which may arise [and] . . . the Union, agree[s] not to engage in any strike, slowdown or interruption of work [or] the [employers] . . . to engage in any lockout."

Most importantly, the Trades Council is recognized "as the sole and exclusive bargaining representative of all craft employees," and its hiring halls are made the initial and principal source for the Project's labor force. All employees are subject to the union security provisions of

the agreement which require that they become union members within seven days of their employment. Employees may seek redress for their grievances only through the recognized labor organizations, and the contractors are bound by the Trades Council member unions' wage and benefit provisions and appreneticeship program. The contractors are required to make contributions to various union benefit trust funds and to observe the unions' work rules and job classifications.

The Master Labor Agreement became "effective [on] May 22, 1989, and shall continue in effect for the duraiton of the Project construction work." As previously indicated, the Project is expected to take ten years to complete.

II. *PROCEDURAL BACKGROUND*

ABC is an organization composed of individual construction contractors and trade associations representing over 18,000 "merit shop" (i.e., nonunion) construction industry employers. On March 5, 1990, ABC brought suit in the United States District Court for the District of Massachusetts against the MWRA, Kaiser and the Trades Council, seeking injunctive relief against enforcement of bidding Specification 13.1. ABC claims that, as applied to its membership, Specification 13.1 effectively bars them from seeking and obtaining any bids in this multi-billion dollar, ten-year endeavor. ABC alleges irreparable injury and damages from what it perceives to be a violation of various federal and state statutes. These contentions, and the district court's treatment of them, can be summarized as follows:

(1) *Preemption under the NLRA.* ABC alleged that the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq.*, prohibits the MWRA from interfering with the labor negotiations process, specifically arguing that requiring employers to accept the terms of a collective bargaining agreement with a union that has

not been designated as the bargaining agent by employees is illegal. The district court held that Section 8(e) and (f) of the NLRA[5] permit such restrictive agreements in the construction industry and that even if the Master Labor Agreement were to affect NLRA-regulated conduct, such impact must be considered against the manifest importance of the Boston Harbor cleanup. "The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages." The court ruled that the Master Labor Agreement was lawful under the circumstances.

(2) *Preemption under ERISA.* ABC claimed that since the Agreement required employers to contribute to trust funds, the Agreement in effect regulated the terms and conditions of employee benefit plans covered under Section 514(c) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(c). The court disagreed, holding that the Agreement is not so broad and only applies to a single discrete project and thus does not contravene ERISA.

(3) *Equal protection and due process clause allegations.* ABC claimed that the bidding procedures discriminate against non-union contractors and effectively preclude such contractors from bidding, thus violating the equal protection and due process clauses. These claims were also rejected by the district court, which ruled that non-union contractors are not a protected class, that bidding procedures were open to all contractors, and that since ABC had failed to make any bid as of yet, a constitutionally protected right was lacking.[6]

(4) *The Sherman Act claim.* ABC alleged that the Master Labor Agreement and Specification 13.1 constitute a conspiracy among appellees to reduce competition in the

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[5] 29 U.S.C. §§ 158(e) and (f).

[6] Analogous state claims were also rejected.

construction industry by effectively precluding non-union contractors, in violation of the Sherman Act; 15 U.S.C. § 1. Below, the court reiterated that appellants were not excluded from the bidding process and furthermore, since the Master Labor Agreements "serves legitimate business, and public purposes" there was not anti-trust violation. Moreover, the district court found that the MWRA, as a state entity, is immune from an anti-trust claim and that Section 8(e) of the NLRA along with labor's non-statutory anti-trust exemption under the Sherman Act protect Kaiser and the Trades Council as well.

(5) *State law claims.* The district court rejected ABC's state law violations claim, ruling that the Massachusetts Public Bidding statute, Mass. Gen. Laws ch. 30, § 39M and ch. 149, §§ 44A-L, specifically required that the winning bidder must furnish labor that can work in "harmony with all the other elements of labor employed or to be employed on the work." It further ruled that there was no interference with business relationships because no relationships existed as of yet.

Thus, the district court denied a preliminary injunction holding, that, first, the appellants were not likely to succeed on the merits. Second, ABC had not shown immediate and irreparable harm because it had not been awarded a contract; even if it had, it would have an adequate remedy at law. Third, the balance of harm to the appellants was outweighed by the harm to the appellees, since the appellees would suffer intolerable delays, disruptions, and increased costs in the Boston Harbor clean-up without Specification 13.1. And last, issuing an injunction would adversely affect the public interest in the swift clean-up of Boston Harbor.

ABC appealed the denial of the preliminary injunction to a panel of this court. In its opinion, the original panel reached only the issue of preemption under the NLRA, finding (as we do) that issue dispositive of the appeal. In its petition for rehearing *en banc*, the Trades Council

raised a new point relevant to NLRA preemption: whether Specification 13.1 should escape preemption because it was necessary to efficient completion of the clean-up. The Trades Council, joined by the NWRA and various amici in their briefs on rehearing, maintain that because the Specification was enacted to further proprietary, rather than regulatory interests, it falls within an exception to the preemption doctrine allegedly articulated by the Supreme Court in *Wisconsin Dep't of Indus. v. Gould*, 475 U.S. 282 [121 LRRM 2737] (1986). We determined that this issue merited closer scrutiny by the court as a whole, and issued an order requesting the parties to address the following issues:

> Is the MWRA's insistence upon the labor conditions at issue reasonably related to an important proprietary interest of the state, a legitimate response to state procurement restraints, or a legitimate response to local economic needs?
>
> If so, is that insistence therefore lawful, *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282, 291 [121 LRRM 2737] (1986) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 [128 LRRM 3233] (1986), being distinguishable in this respect?

III. *STANDARD OF REVIEW*

On review, we will reverse the district court's denial of a preliminary injunction where the denial is an abuse of discretion, or is based upon a clear error of law, or where the district court's findings of fact are clearly erroneous. *See, e.g., Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 751-52 (1st Cir. 1983); *Maceira v. Pagan*, 649 F.2d 8, 15 [107 LRRM 2408] (1st Cir. 1981); *see also General Electric Co. v. New York State Dept. of Labor*, 891 F.2d 25, 26 [133 LRRM 2044] (2d Cir. 1989) (reversing denial of preliminary injunction on ERISA preemption grounds); 7 Moore, *Federal Practice and Procedure* ¶ 65.04[2] (2d ed. 1987). Where,

as here, appellants are asking for a mandatory injunction which will change the *status quo ante* during the pendency of litigation, we will take into account the exigencies and circumstances of the situation. *See Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

To be entitled to injunctive relief a party must establish that it has a likelihood of success on the merits, that it will suffer immediate and irreparable harm if relief is not granted, that such harm outweighs any harm to the non-moving party and that the public interest will not be adversely affected. *Planned Parenthood v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *Lancer v. Lebanon Housing Authority*, 760 F.2d 361 362 (1st Cir. 1985). The balancing of interests shifts in plaintiffs' favor when a strong likelihood of success on the merits is shown. *SEC v. World Radio Mission, Inc.*, 544 F.2d 35, 541-42 (1st Cir. 1976).

IV. *DISCUSSION*

In our opinion, appellants have made a strong showing that they are likely to succeed on the merits. In so holding, we do not reach their entire array of arguments, because in our view, their main argument ultimately carries the day.

A. *Preemption under the NLRA*

In order to analyze preemption under the NLRA, we must first examine a bit of the Act's evolution. Since first enacted in 1935, the NLRA "has empowered the National Labor Relations Board 'to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce.'" 29 U.S.C. § 160(a). "By this language, and by the definition of 'affecting commerce' . . . Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 3 [39 LRRM 2567]

(1957). *See also* 29 U.S.C. § 152(7).[7] Thus, in the area of labor relations there is "not only a general intent to pre-empt the field but also . . . [the] inescapable implication of exclusiveness." *Guss*, 353 U.S. at 10. In *Guss* the Supreme Court went so far as to carry that principle to the point of creating a no-man's land, in which no jurisdiction existed on behalf of state authorities to intervene in labor relations matters covered by the Act notwithstanding the Board's refusal to exercise dominion over such disputes. It should be noted that although *Guss* involved unfair labor practices, the Act uses substantially similar language regarding the representation procedures established thereunder, and therefore the principle established by *Guss* is of equal application to representation matters.[8]

The situation created by *Guss* led in 1959 to the amendment by Congress of Section 14 of the Act, allowing for state intervention in labor disputes affecting commerce in which the Board has specifically declined to exercise jurisdiction.[9] Prior to that amendment, as is dis-

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[7] 29 U.S.C. § 152(7):

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

See also NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 325-26 (6 LRRM 884) (1940) (construing "affecting commerce").

[8] *See* 29 U.S.C. §§ 141(b), 151, 152, 157, 159. For example, § 159(c)(1) provides that:

> Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation *affecting commerce* exists shall provide for an appropriate hearing upon notice . . . (emphasis supplied).

[9] 29 U.S.C. § 164:

> (c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor

cussed in *Guss*, 353 U.S. at 6-7, a state could only intervene in a labor dispute affecting commerce if the Board had entered into a cession agreement pursuant to Section 10(a) of the Act,[10] and then only if the state statute was consistent with a corresponding provision in the Act.

Intervention in labor matters affecting commerce today is thus limited to cession agreements by the Board with the states under Section 10(a) of the Act, or specific declinations by the Board to intervene pursuant to Section 14(c) of the Act. There is a third category, also under

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dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[10] 29 U.S.C. § 160(a):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Section 14 of the Act,[11] which allows the states to legislate to prohibit union shop agreements.

It is a textbook proposition that, under the supremacy clause of Article VI of the Constitution,[12] the "supreme" congressional law supersedes or preempts state law. Preemption occurs not only when there is an outright conflict between the federal scheme and the state requirement, but also when congressional action is an implicit barrier—*e.g.*, when state regulation interferes unduly with the accomplishment of congressional objectives. Congressional legislation in an area in which a state seeks to regulate does not necessarily preclude all state action. Nor does the fact that there is no explicit federal-state conflict or congressional statement of intent to bar state authority inescapably rule out a finding of preemption. *Cf. Guss*, 353 U.S. at 10.

> The question in each case is what the purpose of Congress was [in legislating] . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so domi-

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[11] 29 U.S.C. § 164(b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[12] U.S. Const. art. VI, para. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

> nant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947) (citations omitted).[13]

The Supreme Court has recognized two types of federal preemption of state and local government action in the field of labor law. First, the Supreme Court has prohibited the states from regulating activities "which are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 [43 LRRM 2838] (1959). Second, the Court has held that state and local governments are prohibited from regulating activities which Congress intended to be left unrestricted by any governmental power. *Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Emp. Comm.*, 427 U.S. 132, 140 [92 LRRM 2881] (1976).[14]

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[13] The dissent's definition of preemption, *see* slip op. at 39 (Breyer, C.J., dissenting), although correct as far as it goes, is unduly restrictive. Omitted is any mention of preemption "where the pervasiveness of the federal regulation precludes supplementation by the States, [or] where the federal interest in the field is sufficiently dominant." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 2 [4 IER Cases 141] (1st Cir. 1989).

[14] In *Machinists*, the Court had found unlawful a state commission's prohibition against union refusals to work overtime during collective bargaining negotiations. 427 U.S. at 148-49.

While both forms of preemption are implicated by this appeal, we believe that the present case is most heavily influenced by the Supreme Court's holdings in the *Golden State Transit Corp.* cases, which relied and expanded upon the *Machinists* doctrine. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 [121 LRRM 3233] (1986) [*Golden State I*]; *Golden State Transit Corp. v. City of Los Angeles* [493 U.S. 103], 110 S.Ct. 444 [132 LRRM 3015] (1989). [*Golden State II*]. While there are differences between the *Golden State* cases and the present case, we think the similarities have greater salience.

In *Golden State I* the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. The Supreme Court ruled that the city's action in conditioning renewal of the franchise on settlement of the labor dispute was preempted by the Act. The Court stated, in language which we believe is adaptable to the present controversy:

> Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, . . . unless such restrictions presumably were contemplated by Congress. . . . "[T]he crucial inquiry regarding pre-exemption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective emplementation of the Act's process.' "

Golden State I, 476 U.S. at 614-15 (citations omitted). The city's insistence on a settlement was preempted by the Act because it " 'entered into the substantive aspects

of the bargaining process to an extent Congress has not countenanced.'" *Id.* at 615-16 (citations omitted). This was so because "[t]he NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616.

In *Golden State II*, where the issue involved the availability of compensatory damages, the Supreme Court reiterated with even greater firmness the NLRA's subordination of state interests to the principle of unfettered collective bargaining. The Court declared that the *Machinists* rule—shielding the collective bargaining process from government interference—was not designed "to answer the question whether federal or state regulations should apply to certain conduct. Rather, it is more akin to a rule that denies *either* sovereign the authority to abridge a personal liberty." *Golden State II*, 110 S.Ct. at 451-52 (emphasis added). The Court concluded that the *Machinists* preemption rule "is a guarantee of freedom for private conduct that the state may not abridge." *Id.* at 452.

In the present case, the state's intrusion into the bargaining process is pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here *eliminates* the bargaining process altogether. Inasmuch as regulation of this conduct [15] seems central to federal labor relations, we do not see how it could be considered peripheral under the *Garmon* analysis. *Garmon*, 359 U.S. at 243. *Compare Belknap, Inc. v. Hale*, 463 U.S. 491, 509 [113 LRRM 3057] (1983) (third parties hired as strike

[15] The fact that the state here has acted through its bidding regulations rather than its general law is irrelevant to our analysis, as "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State I*, 475 U.S. at 614 n.5 (quoting *Garmon*, 359 U.S. at 243).

replacements had state-law causes of action based on misrepresentations by the employer); *Automobile Workers v. Russell*, 356 U.S. 634, 635 [42 LRRM 2142] (1958) (state court jurisdiction over common law tort action against union for mass picketing upheld); *Youngdahl v. Rainfair*, 355 U.S. 131, 132 [41 LRRM 2169] (1957) (same re injunctive power to prevent interference with free use of streets); *Automobile Workers v. Wisconsin Emp. Rel. Board*, 351 U.S. 266, 274 [38 LRRM 2165] (1956) (same re power to enjoin violent union conduct); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 657 [34 LRRM 2229] (1954) (state may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways); *Allen-Bradley Local v. Wisconsin Emp. Rel. Board*, 315 U.S. 740, 749 [10 LRRM 520] (1942) (same).

To be sure, there may be instances where the "regulated conduct touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [a court] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. The district judge, in a commendable attempt to harmonize the irreconcilable conflicts presented by this difficult case, reasoned that even if the Master Labor Agreement "were to have some impact on NLRA-regulated conduct, that impact must be considered in the light of important state interest, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense." In effect, the court held that this public purpose sanitized its constitutional shortfalls. While we do not totally fault the court's efforts in this respect, nor disagree as to the importance of the Boston Harbor clean-up, it cannot be said that congressional concern for a uniform, national labor policy as embodied in the NLRA, is entitled to secondary deference. Importantly, the regulated conduct here is the labor relations/bargain-

ing process itself. Such processes have been termed by Congress as paramount to national, not local, interests. We, ourselves, have recognized as much. *See General Electric Co. v. Callahan*, 294 F.2d 60, 67 [48 LRRM 2929] (1st Cir. 1961) (holding that a state labor board's interference with a labor contract negotiation "conflict[ed] with the national policy of free and unfettered collective bargaining"), *cert. dismissed*, 369 U.S. 832 (1962). Moreover, in at least one respect, Specification 13.1 seems not to further, but rather to trample, what the Massachusetts legislature has determined to be the Commonwealth's interest. Massachusetts has enacted a Fair Competitive Bid Law which requires that the Commonwealth obtain through open competition the lowest responsible and eligible bid for public construction projects. Mass. Gen. Laws ch. 30, § 39M, and ch. 149, § 44A-L. Although we do not reach the state law arguments raised by ABC, we do note that this apparent conflict undercuts the MWRA's position that Specification 13.1 furthers peculiarly local interests.

There are few areas in which local interest can be more legitimately exercised than in protecting the public from financial hardship caused by fiscally irresponsible persons using the state highways. Yet the Supreme Court invalidated a state statute whose purpose was resolution of such a dilemma because it concluded that it conflicted with the Federal Bankruptcy Act. *Perez v. Campbell*, 402 U.S. 637, 656 (1971). The Court rejected the argument that the purpose of the state law, rather than its effect on the operation of federal legislation, should govern its validity. Even if the state claimed to be concerned with promotion of highway safety, such a statute could not stand if it conflicted with the federal scheme: "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of

the federal objective—that would be tangentially furthered by the proposed state law." *Id.* at 652.

Although the local concern that led to the promulgation of Specification 13.1—"labor harmony during [the] life . . . [of] . . . this critical project"—are laudable, they conflict with paramount federal law and must therefore fall. We should add that we are in any event somewhat skeptical of the *pax industrial* which the Master Labor Agreement utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that this contract is no bar to rival, or for that matter, antiunion, activity. *See* 29 U.S.C. § 158(f), *last proviso.*

Appellees contend that, had the Master Agreement been entered into directly between the state agency and the unions, it would be unassailable, because "[t]he National Labor Relations Act leaves regulation of the labor relations of state and local government to the States." *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 223 [95 LRRM 2411] (1977). Of course, if the MWRA were the actual employer of the Project laborers, the NLRA would be totally inapplicable as States are excluded from the definition of "employer." 29 U.S.C. § 512(2).[16] The state's substantial participation in the Project, however, is not enough to alter its status from regulator to employer, nor does any party seriously claim such a relationship. There are insufficient indicia of an employer/employee relationship between the MWRA and the laborers.[17] Rather, the state is in its common role of a third

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[16] 29 U.S.C. § 152(2) states in part:

> The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . .

[17] The distinction between an employee and an independent contractor under the NLRA is to be detremined by application of com-

party purchaser. If the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would likely swallow the rule.[18] Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees thus totally displacing the NLRA, not just in this Project, but also statewide, and, if the practice were to become generalized, nationally. Indeed, an anti-union state government could allow only non-union employers to bid on state projects, if the state-as-employer argument is taken to its extreme.

As discussed herein, a state is not included in the definition of employer. Normally, employers cannot enter into prehire agreements. Congress created an exception to this prohibition for *employers* in the construction industry, as such term is defined in the Act. To suggest, as is done by the dissent, *see* slip op. at 51-52 (Breyer, C.J., dissenting), that a *state*, by definition not an em-

mon law agency principles. *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 60 [107 LRRM 3067] (1st Cir. 1981). Under this standard, the relationship between the construction workers and the MWRA is a contracting, not an employment, relationship. For example, the MWRA does not have the right to control the laborers' performance, nor does it pay their salaries, provide pension or other benefits, or make FICA payments on their behalf.

[18] Nevertheless, there may be situations in which a contractual relationship between the state and a private entity is such that the state would be considered an employer for the purposes of the NLRA. *See, e.g., Board of Trustees of Memorial Hosp. v. NLRB*, 624 F.2d 177 [104 LRRM 2825] (10th Cir. 1980) (holding that where a private employer who has contracted to provide services to an exempt political subdivision does not retain sufficient control over the employment relationship to engage in collective bargaining the exempt subdivision is deemed the true employer); *Compton v. National Maritime U. of America*, 533 F.2d 1270 [91 LRRM 3048] (1st Cir. 1976) (noting that a private contractor that performs services for an exempt governmental agency may be deemed to share the exemption).

ployer within this statute, somehow reverts to the status of statutory employer for purposes of this exception is fancy judicial foot work at its nimblest. The facts provide a dose of reality that not only undercuts the dissent's imaginative analysis of the legislative history of the construction industry exceptions, but also destroys its premise that the state should be treated as a private employer. Indisputably, the MWRA is not an employer under either the law, 29 U.S.C. § 152(2), or the facts of this case.

Thus, absent some principled basis for reading an exception into the legal framework, a matter which we discuss *post*, we believe that either because of its regulation of matters protected by § 7 of the Act (*e.g.*, the mandatory recognition of the Trade Council), *Garmon*, 359 U.S. at 245, or because of its direct intrusion into the collective bargaining process, *Golden State I*, 475 U.S. at 614-15, Specification 13.1 frustrates the purposes of the Act and is, therefore, preempted.

B. *Sections 8(e) and (f) of the Act—The construction industry exemption*

Appellees argue, and the district court in effect ruled, that the provision of Sections 8(e) and (f) of the Act validate the Master Labor Agreement "in the context of the unique conditions which exist in the construction industry."

Section 8(e) of the Act[19] makes it an unfair labor

[19] 29 U.S.C. § 158(e) states in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contractor or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforce-

practice for an employer and a union to enter into what is commonly referred to as a "hot cargo" agreement. Under a "hot cargo" agreement, generally, the employer binds itself not to do business with another employer or person. This type of agreement developed out of situations in which unions did not want their members to be working on handling "struck" goods. Section 8(e), however, contains a limited exemption for the construction industry, "relating to the contracting or subcontracting of work to be done at the site of the construction." Thus "hot cargo" agreements are legal, to this circumscribed extent, in the construction industry.

Section 8(f) of the Act [20] creates another exception for the building and construction industry by allowing cer-

able and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or sub-contracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

[20] 29 U.S.C. § 158(f):

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement

tain actions, which would otherwise be prohibited as unfair labor practices, by employers and unions in that line of work. Thus a construction industry employer may enter into a so-called "pre-hire" agreement with a union, *e.g.*, a collective bargaining agreement wherein the union's representative status is immaterial and which in fact is usually entered into prior to the hiring of any employees. Furthermore, such an agreement may contain a union shop provision requiring membership in the union seven days after hiring, 29 U.S.C. § 158(f)(2), which would otherwise be illegal; [21] a requirement that the employer notify the union of job openings giving the labor organization an opportunity to refer qualified job workers, 29 U.S.C. § 158(f)(3); as well as a condition establishing minimum training or experience qualifications and area-wide seniority. 29 U.S.C. § 158(f)(4).

A construction industry labor contract entered into under the exceptional provisions of Section 8(f) is not, as specifically stated in the final proviso of that section, a bar to a petition for election, be it by a rival union,[22] by the employer [23] or by the employees themselves.[24] If the employees elect a rival union as their bargaining agent, neither the winning union nor the employer are

specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[21] The usual provision is 30 days. *See* 29 U.S.C. § 158(a)(3).

[22] 29 U.S.C. § 159(c)(1)(A).

[23] 29 U.S.C. § 159(c)(1)(B).

[24] 29 U.S.C. § 159(e)(1).

required to assume the 8(f) contract. If the employees reject the 8(f) contracting union as their bargaining agent and do not choose another bargaining agent, the contract is totally void because one of the contracting parties is disqualified.

It is apparent from the above that under the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract. *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-66 [113 LRRM 2113] (1983). That conclusion, however, is irrelevant to the preemption issue at hand. Appellants do not challenge the validity of that agreement; they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing of the Master Labor Agreement as a condition of the award of an MWRA bid. On said issue, Section 8(e) and (f) have no bearing except as reinforcement for appellants' preemption arguments. It is clear, both from their nature and history, that Congress extensively debated and considered these controversial provisions before their enactment. *See generally*, 1959 U.S. Code Cong. & Admin. News, p. 2318 *et seq.* It is unlikely that Congress intended to leave open to Balkanization by the states such core areas as unfair labor practices and collective bargaining, which are the matters inescapably arising from Sections 8(e) and (f) problems. Indeed, nowhere in the legislative history is there any indication that a state would be allowed to impose this type of regulation. The history of Sections 8(e) and (f) discusses private employers only; the silence as to permitted state regulation is deafening. In enacting these exceptional provisions, Congress occupied the field to the exclusion of such local regulations as are exemplified by Specification 13.1. *See Guss*, 353 U.S. at 10. Although the Master Labor Agreement is a valid contract pursuant to Sections 8(e) and (f) of the Act, Specification 13.1 unduly interferes with the area of labor negotiations which Congress clearly intended to leave unregulated under the same statute: the collective

bargaining process. *See Golden State I*, 475 U.S. at 614-16.

C. *Proprietary or regulatory interest*

In *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282 [121 LRRM 2737] (1986), the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts as preempted under the *Garmon* doctrine. *Gould*, 475 U.S. at 291. The state argued that it should not be restricted by the Commerce Clause when it acts as a market participant. The Court rejected this argument, noting first, that the state was functioning more as a regulator than as a market participant, and second, that the exception to the Commerce Clause might be broader than state action allowed under the NLRA. *Id.* at 289-90. The Court based its analysis on the differing purposes served by the Commerce Clause and the NLRA: whereas the Commerce Clause contains " 'no indication of a constitutional plan to limit the ability of the States themselves to operate in the free market,' . . . [t]he NLRA, in contrast, was designed in large part to 'entrust administration of the labor policy for the Nation to a centralized administrative agency.' " *Id.* (citations omitted).

In concluding the *Gould* opinion, the Court explored, but did not define, the boundaries of its holding:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-44; *see also, e.g., Belknap, Inc. v. Hale*, 463 U.S. 491, 498

> [113 LRRM 3057] (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. *See New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 [100 LRRM 2896] (1979).

Gould, 475 U.S. at 291. Having opened this door, however, the Court firmly closed it on the Wisconsin rule at issue, stating that "[w]e are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States." *Id.*

Appellees submit that this language creates an exception to the preemption doctrine arising out of the distinction between a state's interest as proprietor versus its interest as regulator. Where a spending decision such as Specification 13.1 is animated by the exigency of doing business rather than the regulation of labor relations; where the measure's effect on labor relations is incidental to a legitimate and necessary proprietary purpose; that measure, argue appellees, is saved from preemption by the supposed *Gould* exception. As a subsidiary proposition, appellees also contend that the MWRA's action would be lawful under Sections 8(e) and (f) were it undertaken by a private employer, and that there is no basis under the NLRA to treat a state more harshly than a comparably situated private party.

We can dispose of the latter contention quite briefly before moving to the more troublesome principal point. First, Congress is perfectly capable of distinguishing between states and private parties when it chooses, and it has so chosen here. Sections 8(e) and (f) refer to "employers." The Act states that the term "employer" "shall not include . . . any State or political subdivision thereof." 29 U.S.C. § 152(2). Thus it is clear that the MWRA is not encompassed by Sections 8(e) and (f), and its conduct cannot be compared with what might be acceptable conduct by a private employer.[25]

Moreover, the Court itself has underscored the state/private distinction, in the very case appellees use to support their proprietary interest argument. The *Gould* opinion states:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Gould, 475 U.S. at 290. Thus it is plain that the private employer comparison merits little weight. The MWRA is an arm of the state, and its actions must be judged accordingly.[26]

Moving to the issue of proprietary interest, we find that we are ultimately unpersuaded that such an excep-

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[25] There are, of course, federal statutes other than the NLRA which treat the actions of states and private parties differently. *See, e.g.*, the Sherman Antitrust Act, 15 U.S.C. §§ 1, 7 (prohibiting certain private conduct but exempting the states); the Securities Act, 15 U.S.C. § 77(c) (exempting government securities from the Act's provisions); the Civil Rights Act, 42 U.S.C. § 1983 (prohibiting certain state conduct only).

[26] The dissent appears to suggest that basing a distinction on whether or not an actor is an arm of the state is overly technical. *See* slip op. at 51 (Breyer, C.J., dissenting). We disagree, and point again to the statutes cited *supra* n.25, as well as the entire Bill of Rights.

tion, if it exists at all, applies in this case. Other than the dicta in *Gould*, the Supreme Court has never articulated—much less applied—a proprietary interest exception. Moreover, the cases cited in *Gould* do not support an exception for the situation at hand. *Belknap v. Hale*, 463 U.S. at 509, is one of a line of cases permitting state tort law remedies to coexist with the NLRA. *See supra* at pp. 20-21. These cases merely indicate application of the *Garmon* analysis allowing state action in "peripheral" areas. *Garmon*, 359 U.S. at 243. For an example of a "spending determination" addressing "state procurement constraints" or "local economic need," *Gould*, 475 U.S. at 291, the Court cited *New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 [100 LRRM 2896] (1979). In that case, the Court found no preemption where the state sought to impose a mandatory minimum benefit (unemployment compensation) through a law of general applicability. *Id.* at 545-46.[27] *See also Fort Halifax v. Coyne*, 482 U.S. 1, 22 [125 LRRM 2455] (1987) (upholding Maine statute requiring employers to provide severance pay); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 [119 LRRM 2569]

[27] In *New York Tel.*, a plurality of the Court held that New York's unemployment benefits statute was not preempted despite the fact that it directly affected the economic balance between striking workers and struck employers. Justice Stevens, joined by two others, argued that because the unemployment statute was a benefits program of general applicability rather than a law directly targeting private conduct in the labor-management realm, it was more difficult to infer congressional intent to preempt it. *See New York Tel.*, 440 U.S. at 533 (plurality opinion). Five Justices disagreed that this distinction impacted the preemption inquiry. *See id.* at 549-50 (Blackmun, J., concurring), 57-58 (Powell, J., dissenting). Justices Blackmun and Powell argued that when a law directly affects labor management relations, whether the statute is of general applicability or is particularly directed at regulating labor-management relations is of little moment. By analogy, then, when a regulation such as Specification 13.1 directly affects labor-management relations, whether the regulation's purpose is propriety or regulatory should be relatively insignificant.

(1985) (upholding state statute requiring certain minimum health benefits to be included in employee health plans). As this court has noted, because such a statute "'neither encourages nor discourages the collective bargaining processes that are the subject of the NLRA,' it is 'a valid and unexceptional exercise of the State's police power.'" *Beckwith v. United Parcel Service, Inc.*, 889 F.2d 344, 349 [132 LRRM 2982] (1st Cir. 1989) (quoting *Metropolitan Life Ins.*, 471 U.S. at 755, 758). Plainly, the same cannot be said of Specification 13.1, which mandates adherence to a particular contract with a particular group of labor unions, in lieu of the collective bargaining process.

Our reading of the *Gould* "exception" is that it largely restates the *Garmon* proposition: Some state interference into the collective bargaining process is permitted if it, first, is "peripheral" to federal labor policy, or, second, pertain to matters "deely rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 243-44. As we have stated *ante*, at p. 20, Specification 13.1 is a direct regulation of the collective bargaining process. Thus it can neither be termed "peripheral" nor "local." To be sure, the Boston Harbor clean-up is a matter of great local interest. It is not the clean-up, however, which is being regulated; collective bargaining is being regulated, and that cannot be.

At any rate, *Garmon* is only one avenue of preemption under federal labor law—albeit one which most likely applies to Specification 13.1. This opinion, however, has rested largely on the *Machinists* doctrine as articulated in *Golden State I*. It is noteworthy that in *Golden State I*, once the Court had determined that the City of Los Angeles had directly interfered with the collective bargaining process, it expressly declined to consider the nature and extent of the City's interest in resolving the labor dispute. *Golden State I*, 475 U.S. at 617-18 and

n.8.[28] Yet the City would seem to have had a strong and legitimate interest in ensuring the adequacy of its transportation system, *see id.* at 620 (Rehnquist, J., dissenting)—at least tantamount to the MWRA's interest in ensuring speedy completion of the harbor clean-up. We can only conclude that the lesson of the *Golden State* cases is that, where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether "proprietary" or otherwise, cannot justify the interference.

D. *Other Allegations*

In view of our ruling on the issue of preemption of Specification 13.1 by the Act, it is unnecessary for us to reach the other questions raised by the appeal. *See Lane v. First National Bank of Boston*, 871 F.2d 166, 168 (1st Cir. 1989).

V. *CONCLUSION*

Specification 13.1 unduly restricts aspects of the labor-management relationship intentionally left unregulated by Congress and is thus preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* The decision of the district court is reversed. The district court, at the direction of this court in its original panel opinion in this case, has already issued a preliminary injunction against enforcement of Specification 13.1. That injunction remained in force during the pendency of the rehearing *en banc*. Therefore, we simply order that the preliminary injunction continue in effect during the further proceedings in this case.

Reversed and remanded. Costs to appellants.

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[28] The Court also did not reach the question of whether the *Garmon* "peripheral" exception even applies to a *Machinists* case. *Id.* at 618 n.8.

Dissenting Opinion

BREYER, Chief Judge, with whom CAMPBELL, Circuit Judge joins (dissenting):—The Commonwealth of Massachusetts, acting through the Massachusetts Water Resources Authority, will let contracts for more than $6 billion of construction work on the Boston Harbor Clean-Up Project. The MWRA requires, as a condition for a contract award, that the winning bidder abide by (and insist that its subcontractors abide by) a pre-hire bargaining agreement. That agreement requires the contractors and subcontractors to recognize the Building Trades Council as bargaining representatives for all craft employees, to hire workers through the hiring halls of the Council's constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the Council's wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the Council unions' benefit funds. In return for the MWRA's promise to insist that contractors sign the agreement, the Council has promised the MWRA labor peace throughout the 10-year life of the construction project.

Were the industry here involved other than the construction industry, we could understand how the majority would consider this agreement a rather intrusive effort by a state agency to control the labor relations of subcontractors with their employees. The construction industry, for labor-relations purposes, however, is special. As all parties concede, the special construction-industry provisions in §§ 8(e) & (f) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) & (f), would permit the MWRA, were it a *private* party letting construction contracts, to act just as it wishes to act here. Indeed, general contractors in the construction industry often enter into prehire agreement of this sort. The only question in this case is whether the NLRA forbids the MWRA, because it is a state agency, to do what the Act explicitly permits a private contractor to do.

The NLRA does not contain any language that *explicitly* forbids a state, acting like a general construction contractor, from entering into a prehire agreement. Rather, the majority believes that the Act *implicitly* forbids it from doing so, *i.e.*, that the Act implicitly removed, or pre-empted, a state's power to act as the MWRA has acted here. Applying general principles of pre-emption, the majority must therefore believe (1) that the MWRA's action "conflicts with" the Act, (2) that it "frustrate[s] the federal [statutory] scheme," or (3) that it appears "from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 [97 LRRM 3147] (1978) (setting forth general conditions for pre-emption); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). We do not see how permitting a state agency, when acting like a general contractor, to make labor agreement just like those that private general contractors make, could "conflict with" the NLRA, "frustrate" the NLRA "scheme," or otherwise interfere with the regulatory system that the NLRA creates. We therefore dissent.

The Supreme Court has described two related sets of concerns that led Congress, implicitly, to forbid certain kinds of state activities. First, Congress intended to grant the National Labor Relations Board *exclusive* authority to determine whether § 8 of the Act prohibits or § 7 of the Act protects certain particular labor-related activities and to provide remedies for violations. Thus, (with a few narrow exceptions) a state may not regulate activities that the Act arguably prohibits or protects. *See San Diego Bldg. Trade Council v. Garmon*, 359 U.S. 236, 244-45 [43 LRRM 2838] (1959). Nor may it add to, or subtract from, the remedies that the federal scheme provides. *See Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 498-99 [33 LRRM 2218] (1953).

Second, Congress intended to "leave some activities unregulated and to be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 [92 LRRM 2881] (1976). Thus, states may not regulate "economic warfare between labor and management," *New York Tel. Co. v. New York State Labor Dep't*, 440, U.S. 519, 530 [100 LRRM 2896] (1979), when doing so significantly interferes with the "intentional balance" that Congress contemplated "between the uncontrolled power of management and labor to further their respective interests." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 [121 LRRM 3233] (1986). They may not, for example, award damages for peaceful secondary picketing, *see Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 258 [56 LRRM 2225] (1964), or forbid a union's concerted refusal to work overtime, *see Machinists*, 427 U.S. at 149, for, in both instances, Congress intended "to preserve" those "means of economic warfare for use during the bargaining process." *New York Tel.*, 440 U.S. at 530.

The majority finds this second kind of pre-emption present here. It concludes that the MWRA has regulated the relationship between labor and management in a way that upsets the "balance" between labor and management that Congress intended. In our view, however, the special construction-industry exceptions in the Act itself show that Congress did not intend pre-emption. Insofar as the MWRA's purchasing decision affects labor-management relations, it does so only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized. Moreover, the relevant Supreme Court cases in this area reinforce our view that the MWRA's actions do not "conflict with" or otherwise "frustrate" the NLRA or its objectives.

1. *The Act's Construction-Industry Exceptions.* The construction-industry exceptions of the NLRA make clear that the conditions that the MWRA wishes to impose do not represent an effort by the state to tilt the economic playing field, that is to say, to interfere with the "free

play of economic forces" between subcontractors and their employees, in a manner that Congress did not intend to permit. Rather, Congress defined the playing field in the construction industry (but not elsewhere) in a special way: it permitted a general contractor to insist that subcontractors enter into prehire agreements of the very sort here at issue. Thus, when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.

To understand how this is so, consider how the construction-industry exceptions work within the context of the Act. The Act, in §§ 8(a), (b) and (e), 29 U.S.C. §§ 158(a), (b) & (e), lists a set of "unfair labor practices." For example, it says in §§ 8(a)(1) and 7 that employers may not interfere with their employees' efforts to organize collectively or discriminate against union members, *id.* §§ 58(a)(1) & 157; it says in § 8(b)(4) that labor organizations may not engage in secondary boycotts, *id.* § 158(b)(4); and, it requires in §§ 8(a)(5) and 8(b)(3) that both employers and labor organizations bargain collectively, *id.* §§ 158(a)(5) & 158(b)(3). Then, in § 8(f), the Act creates a specific construction-industry exception. That exception says:

> (f) It shall not be an unfair labor practice under subsections (a) and (b) . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization [in the construction industry] . . . because (1) the majority status of such labor organization has not been established . . . , or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment . . . , or (3) such agreement requires the employer to notify such labor organizations of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for [seniority requirements] . . . .

Id. § 158(f). Without this exception a construction-industry prehire agreement might constitute an unfair labor practice, for such an agreement (naming the unions to which all employees of all contractors and subcontractors must belong) might be seen as interfering with employees' rights to bargain through representatives of their own choosing, in violation of §§ 8(a)(1) and 7, *see id.* §§ 158(a)(1) and 157, or unreasonably discriminating against those who are not union members, in violation of § 8(a)(3). *See id.* § 158(a)(3).

Section 8(e) supplements the list of unfair labor practices contained in §§ 8(a) and (b) of the Act. It says that it is an unfair labor practice for a labor organization and an employer to enter into what is known, colloquially, as a hot-cargo agreement, an agreement whereby a secondary employer agrees to help a union (engaged in a dispute with a different, primary, employer) by refusing to do business with that other, primary, employer. *See id.* § 158(a). However, a special construction-industry exception, attached to section (e), says:

> [N]othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . .

Id. Without this second exception, a construction-industry prehire agreement might violate the hot-cargo prohibition,

for it requires a signing contractor to "cease doing business" with a subcontractor unless the subcontractor enters into a similar hiring agreement with the union.

The background of these subsections makes clear why Congress chose to create an exception for the construction industry, and those reasons have nothing at all to do with the private or public nature of the general contractor. Labor and management in the construction industry engaged in prehire bargaining long before Congress passed the NLRA. *See To Amend the National Labor Relations Act, 1947, with Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 42 (1951) [hereinafter *Hearings*] (testimony of William E. Maloney, Vice Pres., Building and Construction Trades Dep't, Pres., Operating Engineers, A. F. of L.). The language of the 1935 Wagner Act seemed to outlaw prehire agreements, because, for example, the unions with whom employers would negotiate these agreements typically did not meet the Act's representational requirements. Nonetheless, the prehire bargaining practice continued. The NLRB initially refused to extend its jurisdiction to the construction industry. It said that activity in the construction industry did not "affect commerce." *See* S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952) (citing *In re Brown & Root, Inc.*, 51 NLRB 820 [12 LRRM 278] (1943)).

By the late 1940s, however, federal courts had held that the Board must exercise jurisdiction over this industry. *See* S. Rep. No. 1509, *supra*, at 4. And, the Board eventually concluded that the Taft-Hartley Act of 1947 required it to do so. Consequently, the Board began to invalidate union-security clauses in prehire agreements, and it began to require union-certification elections. This effort to force elections proved unsuccessful. *Id.* at 5. The Board then announced that it would no longer insist

on certification elections, but it would continue to invalidate clauses in prehire agreements when it confronted them. *Id.* at 5-6.

Soon thereafter, the Senate Subcommitte on Labor and Labor-Management Relations held hearings on the construction industry. *See Hearings, supra.* Representatives of both labor and management testified that the special characteristics of the construction industry made it impracticable, unnecessary and undesirable to comply with the requirements of the Wagner Act (as amended by the Taft-Hartley Act). They pointed out that a construction worker typically works at a particular site only for a short time. In such a context, to require formal certification elections is impracticable, for particular employees would not stay on the job long enough to elect representatives who then would bargain with the employer. Those testifying feared that the alternative to prehire bargaining would be no bargaining at all. Without prehire bargaining, unions would not be able to bargain for union security, while contractors would not be able to estimate their labor expenses in advance and would not be able to rely on a steady supply of labor from union hiring halls. *See* generally S. Rep. No. 1509, *supra*, at 3-6 (summarizing testimony at hearing).

The Senate Committee on Labor and Public Welfare then favorable reported a bill that would permit prehire agreements. It said:

> The committee finds that the normal election procedures of the Board have proven unadaptable to this industry because of the short-term, casual employment that is typical of it. The General Counsel's efforts to devise special means . . . have proven fruitless. We conclude that the obstacles to conducting satisfactory elections in sufficient numbers are formidable, if not insuperable.

S. Rep. No. 1509, *supra*, at 6. The bill did not become law for some time. But in 1959, Congress enacted a simi-

lar bill. Both the House and Senate Reports accompanying the 1959 bill indicate that the reasons for the exception of § 8(f) were those identified in the 1951 hearings, namely, the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry. *See* S. Rep. No. 187, 86th Cong., 1st Sess., 27-29 (1959), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 423-25 (1985) [hereinafter *Legislative History*] (set out in Appendix); H.R. Rep. No. 741, 86th Cong., 1st Sess., 19-20 (1959), *reprinted in* 1 *Legislative History*, *supra*, at 777-78; *see also* 105 Cong. Rec. S5731 (daily ed. April 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1064 (remarks of Sen. Javits); 105 Cong. Rec. S5767 (daily ed. April 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, 1082 (remarks of Sen. Goldwater); 105 Cong. Rec. S9117 (daily ed. June 8, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1289 (prepared statement of Sen. Goldwater); 105 Cong. Rec. H14,204 (daily ed. Aug. 11, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1577 (prepared statement of Rep. Rayburn); 105 Cong. Rec. H16,630 (daily ed. September 4, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1715 (remarks of Sen. Kennedy); 105 Cong. Rec. A4308 (daily ed. May 21, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1750 (remarks to Rep. Kearns). At the same time, Congress enacted an exception to § 8(e), so that its prohibition of hot-cargo clauses would not prevent parties in the construction industry from entering into prehire agreements, which, traditionally, included a provision requiring the general contarctors who would sign the prehire agreement. *See* 105 Cong. Rec. S16,414 (daily ed. September 3, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1432 (remarks of Sen. Kennedy) (stating that the proviso of § 8(e) was "necessary to avoid serious damage to the

pattern of collective bargaining in [the construction] industr[y]"); 105 Cong. Rec. S16,414 (daily ed. September 3, 1959), *reprinted in* 2 *Legislative History*, *supra*, at 1721 (remarks of Rep. Thompson) (same).

As the majority correctly points out, the construction-industry exceptions use the word "employer," and § 2(2) of the Act specifically excludes "any State" from its definition of the word "employer." *Ante*, at 23-25, 32. That fact, however, does not destroy the relevance of the exceptions as an indication of Congress's pre-emptive intent. For one thing, the provisions show that Congress specifically focused upon the conduct in question, prehire bargaining, that Congress found that conduct prevalent in the construction industry, and that it wrote the exceptions with the expectation that the conduct would continue in that industry.

For another thing, the *reasons* Congress gave for authorizing the conduct have nothing to do with the public or the private nature of the employer. The special circumstances in the construction industry making meaningful posthire collective bargaining difficult; the corresponding custom in the industry; a general contractor's need to predict labor costs; his need to have available a steady supply of labor: these reasons have to do with the nature of the construction industry and collective bargaining in that industry, conditions likely to remain the same whether a public or private contractor lets contracts for the work.

Further, to permit private general contractors, but not states, to enter into construction-industry prehire agreements would likely produce an odd crazy-quilt of prehire practices. Whether one finds such an agreement would often reflect, not size of the project, or desire of the parties, or special conditions of the industry, but simply whether on not the entity letting the contracts is an arm of the state or private. And, even among state projects, the presence or absence of such an agreement would de-

pend upon whether state law permits the state in question to hire a private general contractor (who, then, presumably, would be free to enter into a prehire agreement), or, as in Massachusetts, requires the state agency to sign the relevant contracts itself. *See* Mass. Gen. L. ch. 30, § 39M; *id.* ch. 149, § 44A *et seq.* We do not understand what purpose, related to labor law, these legal distinctions could serve.

Finally, Congress had two perfectly good reasons for not making the construction industry exceptions explicitly applicable to states, and neither of these reasons suggests any pre-emptive intent. First, the obvious reason is that the list of forbidden practices, to which the exceptions apply, itself applies only to an "employer," defined to exclude "any State," thereby leaving the regulation of labor relations between a state and its own employees primarily to state law. A drafter, writing a statutory exception to the resulting prohibition, would not normally extend its scope beyond those subject to the prohibition in the first place. Second, Congress, particularly when it enacted the construction-industry exceptions in 1959, had little reason to believe that a court might find, hidden in the silence of the Act, some other relevant prohibition applicable to a state.

In sum, the construction-industry exceptions in the Act, including their history and rationale, indicate that when a state acts as an ordinary private purchaser of construction services, it can enter into a typical prehire agreement without "frustrat[ing]" the "federal [statutory] scheme." *Malone*, 435 U.S. at 504.

2. *Supreme Court Precedent.* Unlike the majority, we believe that the relevant Supreme Court decisions offer fairly strong support for our conclusions. For one thing, the *Machinists* case itself makes clear that the Act does not forbid all state action that might favor labor, but, rather, only those state actions that interfere with Congress's "*intentional* balance." *See Golden State*, 475 U.S.

at 614 (citing *Machinists*, 427 U.S. at 146) emphasis added). Here, for reasons just mentioned, we believe Congress intended a "balance" in the construction industry that includes prehire agreements.

For another thing, the Supreme Court has looked to legislative history (indeed, the language and history of *other* congressional statutes), as we have done here, to find the existence or absence of a congressional pre-emptive intent. After examining legislative history that would seem no more significant than that present here, for example, the Court upheld a state law providing unemployment benefits to striking workers, a law that would seem to tip the playing field in the strikers' favor. *See New York Tel.*, 440 U.S. 519 [100 LRRM 2896].

Further, the Court has indicated that the kind of state activity involved is relevant to the pre-emption question. After all, the NLRA seems basically intended to supplant state labor regulation, not to supplant all legitimate state activity that might affect labor. Thus, it is not surprising that the relevant Supreme Court cases, speaking of the area where Congress implicitly intended labor-management relations "to be controlled by the free play of economic forces," refer to freedom from state *regulation*. In *Machinists* itself, for example, the Supreme Court refers to the relevant congressional pre-emptive intent as an intent to "leave some activities *unregulated*." 427 U.S. at 144. It said that the "activities" in question—workers deciding in concert to refuse overtime work—were not to be *regulable* by States. . . ." *Id.* at 149 (emphasis added). And, in *Golden State*, the Court, finding that California could not condition the renewal of a taxicab franchise upon settlement of a labor dispute, said that "*Machinists* pre-emption . . . precludes state and municipal *regulation* 'concerning conduct that Congress intended to be unregulated.'" 475 U.S. at 614 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 [119 LRRM 2569] (1985)) (emphasis added). At

the same time, the Court has noted that even though *Machinists* pre-emption "does not involve in the first instance a balancing of state and federal interests," an "appreciation of the State's interest in regulaing a certain kind of conduct may still be relevant in determining whether Congress in fact intended the conduct to be unregulated." *Metropolitan Life*, 471 U.S. at 749-50 n.27.

Finally, when the Court has considered state *purchasing*, it has carefully considered the nature of the state's action and the legitimacy of the restriction's purpose. In *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 [121 LRRM 2737] (1986), the Court found pre-emption of a Wisconsin purchasing-related rule—a rule that disqualified as a supplier any firm found to have committed several unfair labor practices. In doing so, the Court stressed the lack of any such legitimate relation in the case before it. The Court said that "debarment . . . serves plainly as a means of enforcing the NLRA," *id.* at 287, that it "functions *unambiguously* as a supplemental sanction for violations of the NLRA," *id.* at 288 (emphasis added), and "[*n*]*o other purpose* could credibly be ascribed." *Id.* at 287 (emphasis added). The Court concluded that, because "*Wisconsin simply is not functioning as a private purchaser of services*, for all practical purposes, Wisconsin's debarment statute is tantamount to regulation." *Id.* at 289 (empsasis added). To emphasize the point—that Wisconsin was not acting like "a private purchaser of services"—the Court added:

> We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such 'peripheral concern' to the NLRA, or that implicates 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred. *Garmon*, 359 U.S. at 243-244; *see* also, *e.g.*, *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 [113 LRRM 3057] (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See *New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 [100 LRRM 2896] (1979). But Wisconsin's debarment rule clearly falls into none of these categories. *We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.* The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA.

Id. at 291 (emphasis added).

In the case before us, the record makes clear that the MWRA is participating in a market place as a general contractor, like a private buyer of services. Its role as buyer is not, in any sense, a sham designed to conceal an effort to regulate. That role is direct, normal and necessary for *purchasing*, not *regulatory*, reasons. The MWRA wants to condition its contracts in the same way as, and for the same reasons as, private contractors normally insist upon similar conditions, namely to obtain peaceful working conditions, necessary to get the job done on time. The record requires us to take as given that, without a prehire agreement, hundreds of collective-bargaining agreements would expire during the life of the project, making labor strife likely. Because the major work site, Deer Island, is connected by a narrow isthmus to the mainland, a small number of pickets would find it easy to stop the entire project. Court-ordered deadlines means that delay would cause unusually serious problems. The record therefore supports the MWRA's contention that the prehire agreement serves its economic self-interest as

a purchaser, that it is a "legitimate response to state procurement constraints or to local economic needs." *Id.*

The majority says that the language from *Gould* set out above contains only "dicta," and points out that the pre-emption at issue in *Gould* was *Garmon* pre-emption (pre-emption of state action regulating conduct that is arguably protected or forbidden by the NLRA), not *Machinists* pre-emption (pre-emption of state action regulating conduct that Congress intended to be controlled by the free play of economic forces only). Nonetheless, the "dicta" seem carefully considered, in a unanimous opinion. The fact that *Garmon* rather than *Machinists* pre-emption was at issue seems beside the point. Why should Congress want to leave the states *greater* freedom to interfere with control by the NLRB than to interfere with control by economic forces? Most important, the "dicta" suggest that the state's reasons for a labor-affecting condition are highly relevant, at least when the state is acting as an ordinary buyer. And, as we have just pointed out, the MWRA's reasons are legitimate.

In sum, the MWRA is acting like a buyer, and its reasons for the labor-related condition are legitimate. Furthermore, Congress specifically focused on the conduct in question and, in the case of private contractors, sanctioned it. In this context, we cannot say that the MWRA's actions "conflict" with the NLRA would "frustrate" its purposes. We conclude that Congress did not pre-empt this state activity. Accordingly, we dissent. (We see no reason, since we are in dissent, to express our views on the other issues in the case, though we add that our views are similar to those of the district court.)

Appendix:

S. Rep. No. 187, 86th Cong., 1st Sess., 27-29 (1959).

The problems of the building and construction industry under the Taft-Hartley Act have been the subject of considerable comment by authorities in the field; and Congress in previous years has made several attempts to correct the shortcomings of the act as applied to the industry. The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

During the Wagner Act period, the National Labor Relations Board declined to exercise jurisdiction over the industry not only because of these complexities but also because the industry was substantially organized and hence had no need of the protection by the act. Concepts evoked by the Board therefore developed without reference to the construction industry. In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the act to the building and construction industry.

That this application of the act to the construction industry has given rise to serious problems is attested by the following in which the difficulties of the industry are set forth in detail:

[citing congressional hearings and presidential messages].

The bill endeavors to resolve certain most urgent problems, leaving to the future other difficulties which require attention.

Characteristics of the industry and the bill

In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or more or in many instances as much as 3 years. Since the vast majority of building projects are of short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements is not entirely consistent with the Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees hired.

• • •

The bill [as did an earlier version], contains other provisions which take into account the occasional nature of employment in the building and construction employee. It does so by reducing from 30 days to 7 the grace period before which the employee may be required to join to union. The reduction in this time allowance reflects the normally short employment period for construction employees. Also similar to [the earlier version] are provisions permitting an exclusive referral system or hiring hall based upon objective criteria for referral. Such criteria as are spelled out in the bill are not intended

to be a definitive list but to suggest objective criteria which shall be applied without discrimination. Thus it is permissible to give preference based upon seniority residence, or training of the sort provided by the apprenticeship programs sponsored by the Department of Labor. These provisions are not intended to diminish the right of labor organizations and employers to establish an exclusive referral system of the type permitted under existing law.

APPENDIX B

U.S. COURT OF APPEALS
FIRST CIRCUIT (BOSTON)

No. 90-1392

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

v.

MASSACHUSETTS WATER RESOURCES AUTHORITY, *et al.*

October 24, 1990

Appeal from the U.S. District Court for the District of Massachusetts. Reversed and remanded.

Maurice Baskin (Carol Chandler, Mary L. Marshall, Stoneman, Chandler & Miller, Thomas J. Madden, and Venable, Baetjer; Howard & Civiletti, on brief), for appellants.

John M. Stevens, for appellee MWRA.

James J. Kelley, for appellee Kaiser.

Donald J. Siegel (Mary T. Sullivan and Segal, Roitman & Coleman, on brief), for appellee Building and Construction Trades Council of the Metropolitan District.

Before CAMPBELL and TORRUELLA, Circuit Judges, and RE,* Judge.

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* The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

Full Text of Opinion

TORRUELLA, Circuit Judge:—Plaintiffs-Appellants Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC")[1] appeal the decision of the United States District Court for the District of Massachusetts denying ABC's request for a preliminary injunction. For the reasons stated below, we reverse this decision and remand for action consistent with our opinion.

I. *PROCEDURAL BACKGROUND*

ABC is an organization composed of individual construction contractors and trade associations representing over 18,000 "merit shop" (i.e., non-union) construction industry employers. On March 5, 1990, ABC brought suit in the United States District Court for the District of Massachusetts against the Massachusetts Water Resources Authority ("MWRA"), Kaiser Engineers, Inc. ("Kaiser") and the Building and Construction Trades Council and affiliated labor organizations[2] ("Trades Council"), challenging the legality of the bidding procedures established by MWRA to carry out $6.1 billion worth of public works known as the Boston Harbor Clean-Up Project ("Project"). ABC sought injunctive relief against enforcement of Specification 13.1 of the MWRA's bidding procedures, which provides that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ["the Master Labor Agreement"] as executed and effective May 22, 1989, by and between (Kaiser), on behalf of [MWRA], and the [Trades Council] . . . and will be bound by the provisions of that agreement in the

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1 Also its national association and five individual contractors.

2 Thirty-four in all.

> same manner as any other provision of the contract. A copy of the agreement is attached and included as part of these Contract Documents . . .

ABC claims that, as applied to its membership, Specification 13.1 effectively bars them from seeking and obtaining any bids in this multi-billion dollar, ten-year endeavor. ABC alleges irreparable injury and damages from what it perceives to be a violation of various federal and state statutes, including the Sherman Act, 15 U.S.C. § 1, and the Massachusetts public bidding statutes, Mass. Gen. Laws ch. 149, §§ 44A-44L and ch. 30, § 39M, and moves for a declaratory judgment to the effect that the challenged specification is invalid by reason of its preemption by the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151, *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144.

The district court denied injunctive relief for reasons that will be discussed in more detail, *post*, and this appeal followed pursuant to 28 U.S.C. § 1292(a). Because of the importance of the issues raised, we granted expedited consideration.

II. *THE FACTS*

MWRA is a governmental agency authorized by the Massachusetts legislature to provide water supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts. Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, *United States of America v. Metropolitan District Commission*, C.A. No. 85-0489-MA (Mazzone, J.), the MWRA was ordered to meet a detailed timetable to carry out the clean-up of that body of water. The means and methods of carrying out this task are set forth in the MWRA's enabling statute, Mass. Gen. Laws ch. 92, app. §§ 1-1, *et seq.*, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149,

§§ 44A-44L and ch. 30, § 39M. Pursuant to these laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally exercises control and supervision over all aspects of this project.

In the spring of 1988, the MWRA retained Kaiser as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor, or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work and other limited or emergency situations.

Another important function of Kaiser is to advise the MWRA on the development of a labor relations policy which will maintain worksite harmony, labor-management peace, and overall stability during the ten-year life of the Project. The MWRA had already experienced work stoppages and informational picketing at various sites[3] and was concerned that, because of the scale of the Project and the number of different craft skills involved, it was vulnerable to numerous delays thus placing the court-ordered schedule in jeopardy and subjecting the MWRA to possible contempt orders. This concern was enhanced by the geographic location of the existing and proposed treatment facilities which makes them vulnerable to picketing and other concerted activity.[4]

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[3] In November of 1988, two member unions of the Trades Council picketed the Project and precipitated a brief work stoppage, which was ended by establishment of separate entrances to the job site. This is a well recognized method of maintaining continuity of work in the construction industry. Other threats were made to disrupt the work, but no other significant disruption actually occurred.

[4] At Deer Island access to the site was by a single two-lane road passing through crowded Winthrop streets, and next to the existing

The above circumstances led Kaiser to recommend to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Trades Council, in an effort to arrive at an agreement which would assure labor stability over the life of the Project. Any agreement would be subject to review and final approval by the MWRA.

The MWRA accepted Kaiser's recommendations and in early May 1989 Kaiser proceeded to meet with negotiating teams from the unions, including the Trades Council. The Master Labor Agreement was the result of their negotiations. After review by the MWRA staff, and upon its recommendation, the MWRA Board of Directors on May 28, 1989 adopted the Master Labor Agreement as the labor policy for the Project and directed that Specification 13.1 be added to the bid specification for all new construction work.

The Master Labor Agreement establishes as "the policy of the [MWRA] that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." It is the duty of Kaiser on behalf of MWRA to "monitor compliance with this Agreement by all Contractors who through their execution of this Agreement, together with their subcontractors, have become bound hereto." The parties state the need to meet the "specified and limited time frames" established by the district court's order in the Boston Harbor Clean-up case. Also agreed to are binding methods for the settlement of "all misunderstandings, disputes or grievances which may arise [and] . . . the Union, agree[s] not to engage in

Suffolk County House of Correction. Access to the facility at Nut Island is similarly constrained. Facilities being built off-island to transport workers, construction materials and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Trades Council such as those representing maritime workers.

any strike, slowdown or interruption of work [for] the [employers] . . . to engage in any lockout."

Most importantly, the Trades Council is recognized "as the sole and exclusive bargaining representative of all craft employees," and its hiring halls are made the initial and principal source for the Project's labor force. All employees are subject to the union security provisions of the agreement which require that they become union members within seven days of their employment. Employees may seek redress for their grievances only through the recognized labor organizations, and the contractors are bound by the Trades Council member unions' wage and benefit provisions and apprenticeship program. The contractors are required to make contributions to various union benefit trust funds and to observe the unions' work rules and job classifications.

The Master Labor Agreement became "effective [on] May 22, 1989, and shall continue in effect for the duration of the Project construction work." As previously indicated, the Project is expected to take ten years to complete.

III. *THE PROCEEDINGS BEFORE THE DISTRICT COURT*

ABC's contentions before the district court can be summarized as follows:

(1) *Preemption under the NLRA.* ABC alleged that the NLRA prohibits the MWRA from interfering with the labor negotiations process, specifically arguing that requiring employers to accept the terms of a collective bargaining agreement with a union that has not been designated as the bargaining agent by employees is illegal. The district court held that Section 8(e) and (f) of the NLRA [5] permit such restrictive agreements in the construction industry and that even if the Master Labor

[5] 29 U.S.C. §§ 158(e) and (f).

anti-trust claim and that Section 8(e) of the NLRA along with labor's non-statutory anti-trust exemption under the Sherman Act protect Kaiser and the Trades Council as well.

(5) *State law claims.* The district court rejected ABC's state law violations claim, ruling that the Massachusetts Public Bidding statute specifically required that the winning bidder must furnish labor that can work in "harmony with all the other elements of labor employed or to be employed on the work." It further ruled that there was no interference with business relationships because no relationships existed as of yet.

Thus, the district court denied a preliminary injunction holding that first, the appellants were not likely to succeed on the merits. Second, ABC had not shown immediate and irreparable harm because it had not been awarded a contract and even if it had it would have an adequate remedy at law. Third, the balance of harm to the appellants was outweighed by the harm to the appellees, since the appellees would suffer ominous delays, disruptions, and increased costs in the Boston Harbor clean-up without Specification 13.1. And last, issue of an injunction would adversely affect the public interest in the swift clean-up of Boston Harbor.

IV. *STANDARD OF REVIEW*

On review, we will reverse the district court's denial of a preliminary injunction where the denial is an abuse of discretion, or is based upon a clear error of law, or where the district court's findings of fact are clearly erroneous. *See, e.g., Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 751-52 (1st Cir. 1983); *Maceira v. Pagan*, 649 F.2d 8, 15 [107 LRRM 2408] (1st Cir. 1981); *General Electric Co. v. New York State Dept. of Labor*, 891 F.2d 25, 26 [133 LRRM 2044] (2d Cir. 1989) (reversing denial of preliminary injunction on ERISA preemption grounds); 7 Moore, *Federal Practice*,

Agreement were to affect NLRA-regulated conduct, such impact must be considered against the manifest importance of the Boston Harbor clean-up. "The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages." The court ruled that the Master Labor Agreement was lawful under the circumstances.

(2) *Preemption under ERISA.* ABC claimed that since the Agreement required employers to contribute to trust funds, the Agreement in effect regulated the terms and conditions of employee benefit plans covered under Section 514(c) of ERISA, 29 U.S.C. § 1144(c). The court disagreed, holding that the Agreement is not so broad and only applies to a single discrete project and thus does not contravene ERISA.

(3) *Equal protection and due process clause allegations.* ABC claimed that the bidding procedures discriminate against non-union contractors and effectively preclude such contractors from bidding, thus violating the equal protection and due process clauses. These claims were also rejected by the district court, which ruled that non-union contractors are not a protected class, that bidding procedures were open to all contractors, and that since ABC failed to make any bids as of yet, a constitutionally protected right was lacking.[6]

(4) *The Sherman Act claim.* ABC alleged that the Master Labor Agreement and Specification 13.1 constitute a conspiracy among appellees to reduce competition in the construction industry by effectively precluding non-union contractors. Below, the court reiterated that appellants were not excluded from the bidding process and furthermore since the Master Labor Agreement "serves legitimate business, and public purposes" there was no anti-trust violation. Moreover, the district court found that the MWRA, as a state entity, is immune from an

[6] Analogous state claims were also rejected.

and Procedure ¶ 65.04[2] (2d ed. 1987). Where, as here, appellants are asking for a mandatory injunction which will change the *status quo ante* during the pendency of litigation, we will take into account the exigencies and circumstances of the situation. *See Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

To be entitled to injunctive relief a party must establish that it has a likelihood of success on the merits, that it will suffer immediate and irreparable harm if relief is not granted, that such harm outweighs any harm to the non-moving party, and that the public interest will not be adversely affected. *Planned Parenthood v. Belotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *Lancer v. Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir. 1985). The balancing of interests shifts in plaintiffs' favor when a strong likelihood of success on the merits is shown. *SEC v. World Radio Mission, Inc.*, 544 F.2d 535, 541-42 (1st Cir. 1976).

V. *DISCUSSION*

In our opinion, appellants present a portentous argument that there is a strong likelihood of their success on the merits, an argument which ultimately carries the day.

A. *Preëmption under the NLRA*

We commence with the text book proposition that under the supremacy clause of Article VI of the Constitution,[7] the "supreme" congressional law supersedes or pre-

[7] U.S. Const. art. VI, para. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

empts state law. Preemption occurs not only when there is an outright conflict between the federal scheme and the state requirement, but also when congressional action is an implicit barrier—*e.g.*, when state regulation interferes unduly with the accomplishment of congressional objectives. Congressional legislation in an area in which a state seeks to regulate does not necessarily preclude all state action. Nor does the fact that there is no explicit federal-state conflict or congressional statement of intent to bar state authority inescapably rule out a finding of preemption. *Cf. Guss v. Utah Labor Relations Board*, 353 U.S. 1 [39 LRRM 2567] (1957).

> The question in each case is what the purpose of Congress was [in legislating]. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a preplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947) (citations omitted).

Turning to the specific legislation at hand, the NLRA, as amended,[8] we find that since first enacted in 1935 it

[8] 29 U.S.C. § 151, *et seq.*

"has empowered the National Labor Relations Board 'to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce.'" 29 U.S.C. § 160(a). "By this language, and by the definition of 'affecting commerce' . . . Congress meant to reach to the full extent of its power under the Commerce Clause." *Gus v. Utah Labor Board*, 353 U.S. at 3. *See* 29 U.S.C. § 152(7).[9] Thus, in the area of labor relations there is "not only a general intent to pre-empt the field but also . . . [the] inescapable implication of exclusiveness." *Guss v. Utah Labor Board*, 353 U.S. at 10. In *Guss* the Supreme Court went so far as to carry that principle to the point of creating a no-man's land, in which no jurisdiction existed on behalf of state authorities to intervene in labor relations matters covered by the Act notwithstanding the Board's refusal to exercise dominion over such disputes. It should be noted that, although *Guss* involved unfair labor practices, the Act uses substantially similar language regarding the representation procedures established thereunder, and therefore the principle established by *Guss* is of equal application to representation matters.[10]

The situation created by *Guss* led in 1959 to the amendment by Congress of Section 14 of the Act, allowing for

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[9] 29 U.S.C. § 152(7):

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

See NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 325-26 [6 LRRM 684] (1940) (construing "affecting commerce").

[10] *See* 29 U.S.C. §§ 141(b), 151, 152, 159. For example, § 159(c)(1) provides that:

> Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation *affecting commerce* exists shall provide for an appropriate hearing upon due notice . . . (emphasis supplied).

state intervention in labor disputes affecting commerce in which the Board has specifically declined to exercise jurisdiction.[11] Prior to that amendment, as is discussed in *Guss, id.* at 6-7, a state could only intervene in a labor dispute affecting commerce if the Board had entered into a cession agreement pursuant to Section 10(a) of the Act,[12] and then only if the state statute was consistent with a corresponding provision in the Act.

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[11] 29 U.S.C. § 164:

> (c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[12] 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Intervention in labor matters affecting commerce today is thus limited to cession agreements by the Board with the states under Section 10(a) of the Act, or specific declinations by the Board to intervene pursuant to Section 14(c) of the Act. There is a third category, also under Section 14 of the Act,[13] which allows the states to legislate to prohibit union shop agreements.

The Supreme Court has recognized two types of federal preemption of state and local government action in the field of labor law. First, the Supreme Court has prohibited the states from regulating activities "which are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 [43 LRRM 2838] (1959). Second, the Court has held that state and local governments are prohibited from regulating activities which Congress intended to be left unrestricted by any governmental power. *Lodge 76 Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Emp. Comm.*, 427 U.S. 132, 140 [92 LRRM 2881] (1976).

While both forms of preemption are implicated by this appeal, the present case is indisputably controlled by the Supreme Court's holding in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 [121 LRRM 3233] (1986), which relied on and expanded upon the *Machinists* doctrine.[14] The similarities between *Golden State* and the present case are considerable.

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[13] 29 U.S.C. § 164(b):

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[14] In *Machinists*, the Court had found unlawful a state commission's prohibition against union refusals to work overtime during collective bargaining negotiations. 427 U.S. at 148-49.

In *Golden State* the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the franchise on settlement of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. The Supreme Court ruled that the city's action in conditioning renewal of the franchise on settlement of the labor dispute was preempted by the Act. The Court stated, in language particularly apropros to the present controversy:

> Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, . . . unless such restrictions presumably were contemplated by Congress. . . . "[T]he crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' "

Id. at 614-15 (citations omitted). The city's insistence on a settlement was preempted by the Act because it " 'entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced.' " *Id.* at 615-16 (citations omitted). This was so because "[t]he NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616.

In the present case, the state's intrusion into the bargaining process is all-pervasive. The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For

all intents and purposes the state here *eliminates* the bargaining process altogether. Regulation of this conduct [15] is clearly central to federal labor relations and cannot be considered peripheral under the *Garmon* analysis. *San Diego Unions v. Garmon*, 359 U.S. at 243. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 509 [113 LRRM 3057] (1983) (third parties hired as strike replacements had state-law causes of action based on misrepresentations by the employer); *Automobile Workers v. Russell*, 356 U.S. 634, 635 [42 LRRM 2142] (1958) (state court jurisdiction over common law tort action against union for mass picketing upheld); *Youngdahl v. Rainfair*, 355 U.S. 131, 132 [41 LRRM 2169] (1957) (same re injunctive power to prevent interference with free use of streets; *Automobile Workers v. Wisconsin Emp. Rel. Board*, 351 U.S. 266, 274 [38 LRRM 2165] (1956) (same re power to enjoin violent union conduct); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 657 [34 LRRM 2229] (1954) (state may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways); *Allen-Bradley Local v. Wisconsin Emp. Rel. Board*, 315 U.S. 740, 749 [10 LRRM 520] (1942) (same). Nor can it be considered that the "regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Unions v. Garmon*, 359 U.S. at 244. The regulated conduct here is the labor relations/bargaining process itself. Such processes have been ruled upon by Congress as paramount to national, not local interests. *See General Electric Co. v. Callahan*,

[15] The fact that the state here has acted through its bidding regulations rather than its general law is irrelevant to our analysis, as "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State*, 475 U.S. at 614 n.5 (quoting *San Diego Unions v. Garmon*, 359 U.S. at 243).

294 F.2d 60, 67 [48 LRRM 2929] (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832 (1962) (holding that a state labor board's interference with a labor contract negotiation "conflict[ed] with the national policy of free and unfettered collective bargaining").

Appellees contend that, had the Master Agreement been entered into directly between the state agency and the unions, it would be unassailable, because "[t]he National Labor Relations Act leaves regulation of the labor relations of state and local government to the States." [16] *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 223 [95 LRRM 2411] (1977); 29 U.S.C. § 152(2). The state's substantial participation in the Project, however, is not enough to alter its status from regulator to employer. There are insufficient indicia of an employer/employee relationship between the MWRA and the laborers.[17] Rather, the state is in its common role of a third party purchaser. Indeed, if the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the ex-

[16] There are, of course, federal statutes other than the NLRA which treat the actions of states and private parties differently. *See, e.g.*, the Sherman Antitrust Act, 15 U.S.C. §§ 1, 7 (prohibiting certain private conduct but exempting the states); the Securities Act, 15 U.S.C. § 77(c) (exempting government securities from the Act's provisions); the Civil Rights Act, 42 U.S.C. § 1983 (prohibiting certain state conduct only).

[17] The distinction between an employee and an independent contractor under the NLRA is to be determined by application of common law agency principles. *See NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57 [107 LRRM 3067] (1st Cir. 1981); *Air Transit, Inc. v. NLRB*, 679 F.2d 1095 [110 LRRM 2630] (1982). Under this standard, the relationship between the construction workers and the MWRA is a contracting, not an employment relationship. For example, the MWRA does not have the right to control the laborers' performance, nor does it pay their salaries, provide pension or other benefits, or make FICA payments on their behalf.

ception would seem to swallow the rule.[18] Allowing a state to impose restrictions upon all companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees.

Moreover, the Supreme Court has rejected the proposition that the state employer exclusion from the NLRA is analogous to the somewhat similar Commerce Clause market participant exception. *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 289-90 [121 LRRM 2737] (1986). In *Gould*, the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts. The state argued that it should not be restricted by the Commerce Clause when it acts as a market participant. The Court rejected this argument, noting first, that the state was functioning more as a regulator than as a market participant, and second, that the exception to the Commerce Clause might be broader than state action allowed under the NLRA. The Court based its analysis on the differing purposes served by the Commerce Clause and the NLRA: whereas the Commerce Clause contains " 'no indication of a constitutional plan to limit the ability of the States themselves to operate in the free market,' . . . [t]he NLRA, in contrast, was designed in large part to 'entrust administration of the

[18] Nevertheless, there may be situations in which a contractual relationship between the state and a private entity is such that the state would be considered an employer for the purposes of the NLRA. *See, e.g., Board of Trustees of Memorial Hosp. v. NLRB*, 624 F.2d 177 [104 LRRM 2825] (10th Cir. 1980) (holding that where a private employer who has contracted to provide services to an exempt political subdivision does not retain sufficient control over the employment relationship to engage in collective bargaining . . . the exempt subdivision is deemed the true employer); *Compton v. National Maritime U. of America*, 533 F.2d 1270 [91 LRRM 3048] (1st Cir. 1976) (noting that a private contractor that performs services for an exempt governmental agency may be deemed to share the exemption).

labor policy for the Nation to a centralized administrative agency.' " *Id.* (citations omitted).

Thus, although the MWRA's attempt to regulate may well pass scrutiny under the Commerce Clause, it cannot survive under the NLRA. There should at this late date be no question that either because of its regulation of matters protected by § 7 of the Act (*e.g.*, the mandatory recognition of the Trades Council), *San Diego Unions v. Garmon*, 359 U.S. at 245, or because of its direct intrusion into the collective bargaining process, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. at 614-15, Specification 13.1 frustrates the purposes of the Act and therefore must fall under the doctrine of preemption.

B. *Section 8(e) and (f) of the Act—The Construction industry exemption*

Appellees argue, and the District Court in effect ruled, that the provision of Sections 8(e) and (f) of the Act validate the Master Labor Agreement "in the context of the unique conditions which exist in the construction industry."

Section 8(e) of the Act[19] makes it an unfair labor practice for an employer and a union to enter into what

[19] 29 U.S.C. § 158(e) states in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

is commonly referred to as a "hot cargo" agreement. Under a "hot cargo" agreement, generally, the employer binds itself not to do business with another employer or person. These type of agreements developed out of situations in which unions did not want their members to be working or handling "struck" goods. Section 8(e), however, contains a limited exemption for the construction industry, "relating to the contracting or subcontracting of work to be done at the site of the construction." Thus "hot cargo" agreements are legal to this circumscribed extent, in the construction industry.

Section 8(f) of the Act[20] creates an other exception for the building and construction industry by allowing

[20] 29 U.S.C. § 158(f):

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged for who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such, established under the provision of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicable for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

certain actions, which would otherwise be prohibited as unfair labor practices, by employers and unions in that line of work. Thus a construction industry employer may enter into a so-called "pre-hire" agreement with a union, *e.g.*, a collective bargaining agreement wherein the union's representative status is immaterial and in fact is usually entered into prior to the hiring of any employees. Furthermore, such an agreement may contain a union shop provision requiring membership in the union seven days after hiring, 29 U.S.C. § 158(f)(2), which would otherwise be illegal;[21] a requirement that the employer notify the union of job openings giving the labor organization an opportunity to refer qualified job workers, 29 U.S.C. § 158(f)(3); as well as a condition establishing minimum training or experience qualification and area-wide senority. 29 U.S.C. § 158(f)(4).

A construction industry labor contract entered into under the exceptional provisions of Section 8(f) is not, as specifically stated in the final proviso of that section, a bar to a petition for election, be it by a rival union,[22] by the employer[23] or by the employees themselves.[24] If the employees elect a rival union as their bargaining agent, neither the winning union nor the employer are required to assume the 8(f) contract. If the employees reject the 8(f) contracting union as their bargaining agent and do not choose another bargaining agent, the contract is totally void because one of the contracting parties is disqualified.

It is apparent from the above that under the exceptions established by Sections 2(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser, is a valid labor contract. *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-66 [113 LRRM 2113]

[21] The usual provision is 30 days. *See* 29 U.S.C. § 158(a)(3).

[22] 29 U.S.C. § 159(c)(1)(A).

[23] 29 U.S.C. § 159(c)(1)(B).

[24] 29 U.S.C. § 159(e)(1).

(1983). That conclusion, however, is irrelevant. Appellants do not challenge the validity of that agreement, they contest the legality of Specification 13.1, which establishes recognition of the Trades Council and signing of the Master Labor Agreement as a condition of the award of an MWRA bid. On said issue, Sections 8(e) and (f) have no bearing, except as reinforcement for appellants' preemption arguments. It is clear, both from their nature and history, that Congress extensively debated and considered these controversial provisions before their enactment. *See generally*, 1959 U.S. Code Cong. & Admin. News. p. 2318. It is unlikely that Congress intended to leave open to Balkanization by the states, such core areas as unfair labor practices and collective bargaining, which are the matters inescapably arising from Sections 8(e) and (f) problems. There can be no question but that in enacting these exceptional provisions Congress occupied the field to the exclusion of Specification 13.1. *Guss v. Utah Labor Board*, 353 U.S. at 10. In short, although the Master Labor Agreement is a valid contract pursuant to Sections 8(e) and (f) of the Act, Specification 13.1 must be struck down as unduly interfering with the area of labor negotiations Congress intended to leave unregulated under the same statute.

C. *State interests*

The district judge, in a commendable attempt to harmonize the irreconcilable conflicts presented by this difficult case, reasoned that even if the Master Labor Agreement "were to have some impact on NLRA-regulated conduct, that impact must be considered in the light of important state interest, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense." In effect, the court held that this public purpose sanitized its constitutional shortfalls. While we do not totally fault the court's efforts in this respect, nor disagree as to the importance of the Boston Harbor clean-up, it cannot be said that con-

gressional concern for a uniform, national labor policy as embodied in the NLRA, is entitled to secondary deference.

There are few areas in which local interest can be more legitimately exercised than in protecting the public from financial hardship caused by fiscally irresponsible persons using the state highways. Yet the Supreme Court invalidated a state statute whose purpose was resolution of such a dilemma because it concluded that it conflicted with the Federal Bankruptcy Act. *Perez v. Campbell*, 402 U.S. 637, 656 (1971). The Court rejected the argument that the purpose of the state law, rather than its effect on the operation of federal legislation, should govern its validity. Even if the state claimed to be concerned with promotion of highway safety, such a statute could not stand if it conflicted with the federal scheme: "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative report articulating some state interest of policy —other than frustration of the federal objective—that would be tangenitially furthered by the proposed state law." *Id.* at 652.

Although the local concerns that led to the promulgation of Specification 13.1—"labor harmony during [the] life . . . [of] . . . this critical project"—are laudable, they conflict with paramount federal law and must therefore fall. We should add that we are in any event somewhat skeptical of the *pax industrial* which the Master Labor Agreement utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that this contract is no bar to rival, or for that matter, anti-union, activity. *See* 29 U.S.C. § 158(f), *last proviso.*

D. *Other Allegations*

In view of our ruling on the issue of preemption of Specification 13.1 by the Act, it is unnecessary for us to reach the other questions raised by the appeal. *See Lane*

v. First National Bank of Boston, 871 F.2d 166, 168 (1st Cir. 1989).

VI. *CONCLUSION*

Specification 13.1 unduly restricts aspects of the labor-management relationship intentionally left unregulated by Congress and is thus preempted by the National Labor Relations Act, as amended. 29 U.S.C. § 151, *et seq.* The decision of the district court is reversed and mandate shall issue forthwith with instructions to the district court that it issue an order preliminarily enjoining enforcement of Specification 13.1.

Reversed and remanded.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 90-10576-MA

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC. *et al.*,
Plaintiffs

vs.

THE MASSACHUSETTS WATER RESOURCES AUTHORITY, *et al.*,
Defendants

MEMORANDUM AND ORDER

Mazzone, D.J. April 11, 1990

This is an action for damages, injunctive and declaratory relief, at the heart of which is the Boston Harbor clean-up project. The plaintiffs, Associates Builders and Contractors of Massachusetts/Rhode Island, Inc. (ABC), its national organization and five individual contractors, seek to enjoin the defendants, The Massachusetts Water Resources Authority (MWRA), its project manager, Kaiser Engineers, Inc. (Kaiser), and the Building and Construction Trades Council (Council), from enforcing Specification 13.1 of the MWRA's bid procedures. Specification 13.1 requires that all successful bidders on construction contracts affecting the harbor clean-up agree to observe the Boston Harbor Wastewater Treatment Facilities Agreement (Agreement). The Agreement, in turn, requires that the Council's member unions, thirty-four in all, serve as the exclusive bargaining representative for

all employees on project contracts; that all employees must be referred by local union hiring halls; that all employees are subject to the union's compulsory membership provisions: that all employees are governed by the unions' wage and benefit provisions, contributions, and union work rules and job classifications.

The plaintiffs' position is straightforward. They claim that without injunctive relief, the plaintiffs are effectively prevented from obtaining work on this multi-billion dollar, ten-year, public works project. Affidavits submitted by ABC, its national organization and the plaintiff contractors allege that all construction contracts should be awarded to the lowest, responsible bidder through open and competitive bidding regardless of labor affiliation. If this practice were followed, they say, the taxpayers and consumers would receive the most value for their construction dollar. These non-union contractors, though ready, willing and able to perform on project contracts have not, and will not bid on any contracts because of the restrictive requirements of the Agreement. They seek damages for violations of the anti-trust provisions of the Sherman Act, 15 U.S.C. § 1, and certain state common law torts. They also seek a declaratory judgment: that the Agreement is pre-empted by the National Labor Relations Act (NLRA) and the Employee Retirement Income Security Act (ERISA); that the Agreement denies the plaintiffs' due process and equal protection rights under the state and federal constitutions; and, finally, that the Agreement violates the Massachusetts public bidding statutes.

On that record, the plaintiffs claim they have satisfied the criteria necessary for injunctive relief, namely: they have demonstrated a likelihood of success; will suffer immediate and irreparable harm if relief is not granted; such harm outweighs any harm to the defendants, and, the public interest will not be adversely affected. *Planned Parenthood* v. *Bellotti*, 641 F.2d 1006, 1009 (1st

Cir. 1981). Pursuant to Rule 52, Fed. R. Civ. P., and after review of the entire record, including all affidavits, and after hearing, I make the following findings of fact and conclusions of law.

I.

The MWRA is responsible for the Boston Harbor clean-up project pursuant to orders and a schedule established by this Court. *See* Memorandum and Orders issued on September 5, 1985, December 23, 1985 and May 8, 1986, in *United States of America* v. *Metropolitan District Commission, et al.*, Civil Action No. 85-489-MA. In April, 1988, the MWRA retained Kaiser as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. In the course of performing its function, however, Kaiser could be expected to employ craft labor in certain situations. Its agreement with the MWRA permits it to act as an execution contractor or to perform certain direct hire work as needed in cases of default or incomplete performance by other contractors, clean-up work, and other limited or emergency situation. Another important function of Kaiser was to advise the MWRA on the development of a labor relations policy which would maintain worksite harmony, labor-management peace and overall stability during the ten year course of the project. The MWRA had already experienced work stoppages and informational picketing at various sites and was concerned that because of the scale of the project and the number of different craft skills involved, the project was vulnerable to numerous delays, thus placing the court-ordered schedule in jeopardy and subjecting it to the contempt orders of this Court. This concern was enhanced by the geographic location of the existing and proposed treatment facilities, especially at Deer Island where access to the site was by a single two lane road, through crowded Winthrop streets, and past the existing Suffolk County House of Correction. Access to the facil-

ity at Nut Island is similarly constrained. Proposed facilities being built off-island to transport workers, construction material and equipment across the harbor to Deer Island would have to be designed or adapted to the potential for labor unrest with unions other than member unions of the Council, such as the maritime workers' union.

Kaiser, by virtue of its extensive experience on large construction projects and its dealings with hundreds of building trade unions, recognized and understood the need for labor peace and stability on a project of this magnitude. It was aware that the MWRA was operating under court-mandated milestones and it knew of the significant union presence in the Boston area. A major concern was the location of the work sites and the pressure points at which labor demonstrations could choke the movement of personnel and material. Accordingly, Kaiser recommended to the MWRA that it be permitted to negotiate with the building and construction trades unions, through the Council, in an effort to arrive at an agreement which would assure labor stability over the life of the project. Any agreement was subject to review and final approval of the MWRA.

The MWRA accepted Kaiser's recommendations and in early May, 1989, negotiating teams from the unions and Kaiser met. The Agreement was the result of their negotiations. Its principal provisions were standardization of working conditions for all construction employees, particularly hours and travel pay, a ten-year no-strike clause and an effective and expeditious dispute resolution mechanism. After review of the MWRA staff and upon its recommendation, the MWRA Board of Directors, on May 28, 1989, adopted the Agreement as the labor policy for the project and directed that Specification 13.1 be added to the bid specification for all new construction work. The purpose was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the

risk of substantial fines for non-compliance. In the absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. And, of course delays will mean that Boston Harbor would continue to be subjected to environmental abuse.

Against this factual backdrop, I turn to the criteria for injunctive relief. I focus primarily on the likelihood that the plaintiffs will succeed on the merits and their claims and deal *seriatim* with the specific grounds asserted.

1. *Preemption Under the NLRA*

The plaintiffs say that because the MWRA, a public agency, has dictated the terms of the Agreement under which the ABC contractors can work, but has not allowed those contractors to participate in the negotiations that produced the Agreement, it has impermissibly intruded into the area of labor law preempted by the NLRA. Citing *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) and *Hydrostorage, Inc.* v. *Northern California Boilermakers Local Joint Apprenticeship Committee*, 285 F. Supp. 718 (N.D. Cal. 1988), *aff'd*, 891 F.2d 719 (9th Cir. 1989); the plaintiffs' claim that the NLRA guarantees them the right to bargain independently with only those unions designated by their own employees. Therefore, the question presented is whether by virtue of the Agreement, there has been some interference by either the MWRA or Kaiser in an area which Congress sought to leave unregulated.

As clear as the plaintiffs posit their claim, it is equally clear that Congress addressed that claim in the context of the unique conditions which exist in the construction industry. Sections 8(e) and 8(f), NLRA; *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). Section 8(e) contains a proviso expressly permitting restrictive agreement which bind other

secondary employers, such as the plaintiffs, when, as is the fact here, Kaiser plans to employ some employees at the site. *Morrison-Knudsen Co., Inc. NLRB Advice Memorandum*, March 27, 1986. Section 8(f) allows construction labor agreements that condition employment upon a willingness to abide by union rules, even though the employees did not designate the union as their representative. *NLRB* v. *Ironworkers*, 434 U.S. 335. These special privileges for the construction industry were necessary, Congress found, to alleviate the serious problems arising out of the unique practice of the construction industry. *NLRB* v. *Ironworkers, supra. Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982).

Even if this Agreement were to have some impact on NLRA-regulated conduct, that impact must be considered in the light of important state interests, namely the scheduled and court-ordered completion of the harbor clean-up expeditiously and without unnecessary expense. The scope of preemption requires an examination of "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 297 (1977); *Beckwith* v. *United Parcel Service, Inc.*, No. 89-1476, slip op. (1st Cir. November 16, 1989). This critical project compels labor harmony its life. Given the many, different crafts involved, and the number of separate contracts necessary and the probability of local, isolated, jurisdictional disputes among *represented* employees could bring the project to a halt at any time and on a perfectly lawful basis. The presence of *non-represented* employees simply increases the potential for continuous strife and crippling work stoppages.

Under the circumstances present in this case, I believe the Agreement is lawful.

2. *Preemption Under ERISA*

Pursuant to Section 514(a), 29 U.S.C. § 1144(a), ERISA preempts all state laws which relate to an employee benefit plan. The plaintiffs claim that this Agreement requires employers to contribute to trust funds and, thus, it purports to regulate the terms and conditions of employee benefit plans as defined by Section 514(c). *Hydrostorage, Inc., supra.*

Unlike the situation presented in *Hydrostorage, supra*, this Agreement applies to a single, discrete project. It does not apply to all state contracts or to all employers doing business in the state. The state's concern here is to maintain labor harmony on a single, albeit large, public works project that presents the variety of problems set out above. The Agreement does not purport to regulate the terms and conditions of employee benefit plans. Section 514(c), ERISA. No specific plan or benefit is mandated. The agreement simply requires successful bidders to abide by negotiated conditions which can be altered or modified during the life of the contract. Whatever effect the Agreement may have on employee benefit plans is to remote or peripheral to constitute state law. *Wisconsin Department of Industry, Labor and Human Relations* v. *Gould, Inc.*, 475 U.S. 282, 281 (1986). *Shaw* v. *Delta Airlines*, 463 U.S. 85, 100 n.21 (1983).

3. *The Fourteenth Amendment Claims*

(a) *Equal Protection*

The plaintiffs claim that in reacting to a threat of labor unrest, the MWRA is effectively sponsoring discrimination against non-union contractors, and discriminating in favor of organized labor. *City of Richmond* v. *J.A. Croson*, 109 S. Ct. 706 (1989).

This argument fails for two reasons. First, non-union contractors do not constitute a protected class for pur-

poses of equal protection analysis. *Hoke Co.* v. *TVA*, 854 F.2d 820, 828 (6th Cir. 1988). All contractors are invited to bid on the same terms. No contractor is favored under the bid procedures even though a non-union contractor may be required to conform to certain terms and conditions under which a union contractor already operates. Secondly, if there were disparate treatment, the state's interest in eliminating disruption and delay on the project provides a rational basis for the Agreement. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

(b) *Due Process*

The plaintiffs claim that by incorporating the Agreement into its bid procedures, the MWRA is effectively precluding the plaintiff contractors from bidding, and thus, is depriving non-union contractors of a protected property interest in an award or consideration for a contract.

First, the plaintiff contractors have not bid on any contract and, therefore, cannot claim that they were denied access to the bidding process or denied the fair application of the bidding procedures. *Smith & Wesson* v. *United States*, 782 F.2d 1074 (1st Cir. 1986); *Three Rivers Cablevision, Inc.* v. *City of Pittsburgh*, 502 F. Supp. 1118 W.D. Pa. 1980). Moreover, they are unable to specify any entitlement to a contract, other than to voice a desire to bid unencumbered by the terms of the Agreement. This is not suffiicent to establish a constitutionally protected right under the Fourteenth Amendment. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Accordingly, the plaintiffs have not been denied a fair consideration for the award of any contract.

4. *Violation of the Sherman Act, 15 U.S.C. § 1*

The plaintiffs claim that the Agreement and its incorporation by Specification 13.1 demonstrates a conspiracy among the defendants, fueled by the coercive tactics of

the construction industry by effectively precluding non-union contractors from bidding on harbor clean-up contracts.

Again, it must be pointed out that the plaintiff contractors have not been excluded from bidding. They simply have refused to bid on any contract because of what they term is their principled unwillingness to submit to the conditions laid down by the MWRA. Even if the MWRA's position could be termed a refusal to deal, such a refusal would not be unreasonable. The MWRA's purpose has always been to maintain the court-ordered schedule at the greatest cost savings by reducing the potential of work stoppages due to labor unrest. This Agreement serves a legitimate business, and public purpose and, thus, does not violate the anti-trust laws. E.g., *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981); *cert. denied*, 454 U.S. 921 (1982). Moreover, the state action doctrine bars this claim. *Parker* v. *Brown*, 317 U.S. 341 (1943). As a state entity the MWRA is immune from an anti-trust claim. *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F.2d 9, 13 (1st Cir. 1987). This doctrine also bars the anti-trust claims against Kaiser. *See Southern Motors Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 56-59 (1985).

Finally, the claim against Kaiser and the Council is based on their execution of the Agreement. That claim is barred by Section 8(e) of the NLRA and labor's non-statutory anti-trust exemption under the Sherman Act. As the facts show, Kaiser's employees will be covered by the Agreement and, thus, Kaiser will be treated in the same manner as all other contractors. *Woelke & Romero Framing, Inc.* v. *NLRB, supra.*

5. *The Massachusetts Public Bidding Statutes*

The plaintiffs next claim is that the Agreement violates the public bidding statutes of Massachusetts, be-

cause it effectively precludes non-union bidders. G.L. c. 30, § 39M and G.L. c. 39, § 44A.

The short answer to this claim is in the language of the statutes. Passing the question of standing to raise this issue, the statutes require the MWRA to award work to the "lowest responsible and eligible" bidder who "shall certify that (it) is able to furnish labor that can work in harmony with all the other elements of labor employed or to be employed on the work." G.L. c. 30 § 39M(c), G.L. c. 149 § 44A(1). The MWRA has the authority to make that determination and its determination will be upheld unless it is arbitrary, capricious or made in bad faith. *Modern Continental Construction Company, Inc.* v. *Massachusetts Port Authority*, 369 Mass. 825 (1975). *See also* Opinion of February 16, 1990, Executive Office of Labor, Department of Labor and Industries, Exhibit D to Complaint.

6. *The Massachusetts Constitutional and State Law Claims.*

These claims fail for a variety of reasons, some of which are discussed above and the remaining issues require no more than a brief note. There can be no interference with advantageous business relationships because the MWRA has not refused, nor will it refuse to enter into any contract that conforms to the terms of the Agreement, nor is there anything in the record to show that Kaiser or the Council is procuring or attempting to procure such refusals. The state constitutional and civil rights claims like their federal counterparts above, fail to identify the particular right or interest which has been violated or denied. See generally *Associated Builders and Contractors of Kentuckiana, Inc. and River City Development Corporation* v. *Ohbayash Corporation*, No. 87-38 (D. Ky. October 26, 1987).

III.

Based on the foregoing findings and conclusions, the plaintiffs are not entitled to preliminary injunctive relief.

1. As the above discussion indicates, the plaintiffs have failed to demonstrate a likelihood of success in the merits.

2. The plaintiffs will suffer no immediate and irreparable injury. After waiting over nine months to bring this motion, the plaintiffs have not bid on any contract for which they claim they are eligible. Had they bid and been awarded a contract, they would have suffered no harm.[1] Had they bid and been denied a contract, they would be in a position to claim damages if the Agreement were later shown to be illegal.

3. The harm to the plaintiffs is outweighed by the harm to the defendants. First, the plaintiffs are not precluded from bidding. And since the plaintiffs agree they must pay at least the prevailing wage on this project, their harm appears limited to a violation of their announced principle that they should not be required to recognize unions and union regulators that have not been designated by their employees. Other than this project, the non-union contractors are free to operate on their own terms on any other job and they are free to litigate

[1] At hearing, counsel for ABC advised the Court that one contract awarded by the MWRA to DEC-TAM Corporation, a non-union contractor, had been cancelled because of the Agreement. An affidavit supporting that statement was later filed by the executive vice-president of ABC.

That affidavit was followed in short order by an affidavit from the MWRA indicating that the contract, for asbestos removal from three engines, was not for services subject to the Agreement and was awarded to the only bidder in response to limited advertising. After work was completed on one engine which was urgently needed, the contract was cancelled because the other two engines were in sufficiently good condition for emergency, standby duty and the price was too high. If further work were needed, the MWRA will advertise more extensively to obtain the lowest price.

the validity of the Agreement and, if successful, establish their damages.

On other hand, the defendants will suffer serious harm in the absence of this Agreement. Disruption, delays and increased costs to the ratepayers and taxpayers are virtually certain to occur without the means to eliminate the basic conflicts and without the mechanism to resolve anticipated disputes.

4. The public interest will be adversely affected were the injunction to issue. As the foregoing makes evident, the Agreement insures that the long overdue harbor clean-up will not be delayed by labor disharmony. The right of the public to an unpolluted harbor, maintaining the schedule for the clean-up and controlling its cost are vital concerns.

The plaintiffs are careful to point out that they do not seek to delay the Boston Harbor clean-up project, but only to provide high quality construction work at lower costs, with greater flexibility and freedom than would be possible if they were to operate under restrictive union agreements. They are also careful to say they do not oppose the entire Agreement, and would be bound by the no-strike clause, most of the dispute resolution provisions and standardized work hours. They simply oppose those provisions which compel recognition of unions or which compel them to adopt specific union contracts.

This position seems to ignore Congress' purpose in enacting Sections 8(e) and 8(f), NLRA, to address the reality of the unique conditions in the construction industry. That reality is present in the circumstances of this case, and under those circumstances, I conclude the Agreement is not unfair or illegal.

Accordingly, the motion for preliminary injunction is denied.

SO ORDERED.

/s/ A. David Mazzone
United States District Judge

APPENDIX D

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

MEMORANDUM

Date: Jun 25, 1990
8(e) Chron, 8(f) Chron, 584-5000

TO

Rosemary Pye, Regional Diector
Region 1

FROM

Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT

Building & Trades Council, et al
(Kaiser Engineers, Inc.)
Case 1-CE-71

This case was submitted for advice as to: (a) whether a provision in a contract is a "hot cargo" agreement; and (b) if so, whether it is privileged by the construction industry proviso of Section 8(e).

Facts

The Massachusetts Water Resources Authority (MWRA) is responsible for the Boston Harbor clean-up project under a federal court order pursuant to the Clean Water Act.[1] In April 1988, the MWRA chose Kaiser Engineers, Inc. (Employer), a well know general con-

[1] The court order also imposes a time table for the project which involves construction of wastewater treatment facilities for the Boston Harbor.

tractor and construction manager, to be the program/construction manager for the project.

As construction manager, the Employer is required to manage and supervise the project, including planning, procurement, budget, scheduling and labor relations matters. Because of concerns about possible conflicts of interest arising from the program/construction manager's role, the MWRA has barred the Employer from bidding on any of the construction work for the project. However, with MWRA approval, the Employer intends to employ construction trades employees on the project in certain limited circumstances.[2]

In May 1989, the Employer entered into a project agreement (Agreement) with the Building and Trades Council and approximately 40 local and international construction trade unions (Unions) for the construction work on the Harbor project.[3] The Agreement provides standardized working conditions for all construction employees.[4] It also provides that all construction subcontractors must agree to be bound by the Agreement.

In March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island (ABC) brought a civil action, including a request for a preliminary injunction, attacking the legality of the Agreement on various

[2] M.G.L. Chapter 30, Section 39M requires that any work performed for the Commonwealth of Massachusetts must be put out to bid if the cost of that work exceeds $5,000. The MWRA and the Employer agree that the Employer can perform certain construction work in cases of default or incomplete performance by other contractors, clean-up and temporary work, and in other limited emergency situations which would cost $5,000 or less.

[3] There is no contention that the Employer acted as an agent of MWRA rather than as a principal when it signed the Agreement.

[4] Article II of the agreement provides that any construction work the Employer performs will also be covered by the Agreement.

grounds.[5] On April 11, 1990, the district court denied the request for preliminary injunctive relief. The court found, inter alia, that the Agreement was lawful under the proviso to Section 8(e) and under Section 8(f).

On March 14, 1990, the Utility Contractors Association of New England (UCA) filed the instant charge alleging that the Agreement was in violation of Section 8(e). UCA contends that the provision is not privileged by the construction industry proviso to Section 8(e) since the Employer does not and will not employ any employees on the project.[6] UCA further contends that even if the Employer employs any craft employees the Agreement is still not valid as it was entered into by the MWRA as a result of unlawful secondary pressure. In this regard, UCA relies on picketing by several Unions at other MWRA jobsites prior to the negotiation of the Agreement. Lastly, the UCA contends that even if the Agreement is lawful in general, it is unlawful with respect to surveyors since it does not cover surveyors employed by the Employer.

Action

We conclude that the provision is a "hot cargo" agreement within the ambit of Section 8(e). We further conclude that the provision was lawful under the construction industry proviso to Section 8(e).

Initially, we concluded that the clause is a "union signatory" clause and is secondary and within the ambit of 8(e). The agreement between the Employer and the

[5] Among other grounds, ABC argued that the Agreement, whose terms were approved by the MWRA, was preempted by the NLRA.

[6] UCA disagrees with MWRA and the Employer that the Employer can perform certain construction work on the project. It argues that the Employer is prohibited by state law from doing any construction work on the project without first bidding for it. Since the MWRA has barred the Employer from bidding on any construction work, the UCA argues that the Employer will not be able to perform any construction work on the project.

Unions requires that all subcontractors on the site must be bound by the Agreement.[7] In essence, the Employer cannot do business with companies who do not agree to bound to the Union contract. Thus, the Agreement would violate Section 8(e) unless it is encompassed by the construction industry proviso to Section 8(e).

The Supreme Court has held that the construction industry proviso to Section 8(e) authorizes a "union signatory" clause by a union and an employer in the construction industry in the context of a collective bargaining relationship.[8] In the instant case, it first must be determined whether the Employer is an employer in the construction industry. The Employer is a well-known general contractor and construction manager. Indeed, in the instant case, the Employer's main responsibility is to supervise the project, including planning, procurement, budget, scheduling, and labor relations. In addition, the Employer will employ employees on the project. Where, as here, an employer's principal business is in the construction industry, and it is acting as an employer of construction employees on the particular project, it is clear that such an employer is "an employer in the construction industry" for purposes of Section 8(e).[9] Moreover, even if an employer's principal business is not in the construction industry, but it acts as the general contractor on a specific construction project, the Board finds it to be an employer in the construction industry based on the degree of control it retains over the labor relations at the jobsite.[10] As noted, supra, the Employer's prime

[7] *Orange Belt District Council of Painters No. 48 (Maloney Specialties, Inc.*, 276 NLRB 1372, 1387 (1985).

[8] See *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 633 (1975).

[9] *United Brotherhood of Carpenters and Joiners of America (Longs Drug Stores, Inc.)*, 278 NLRB 440, 442 (1986).

[10] *Los Angeles Building & Construction Trades Council (Church's Fried Chicken, Inc.)*, 183 NLRB 1032 (1970).

responsibility in this case is to supervise labor relations on the jobsite.

Next, it must be determined whether the Agreement was entered into in the context of a collective bargaining relationship. A Section 8(f) relationship satisfies this requirement.[11] In the instant case, the Employer entered into a Section 8(f) pre-hire contract with the Unions.

The Charging Party contends that there can be no bargaining relationship of any kind unless the Employer hires and intends to hire employees covered by the Agreement. The General Counsel has authorized 8(e) proceedings where the employer did not hire and did not intend to hire any construction employees.[12] However, in the instant case, the Employer intends to employ craft employees on the project, and these employees will be covered by the Agreement.[13] Thus, it is clear that the Employer entered into a valid Section 8(f) relationship. Accordingly, the Agreement is protected by the proviso.

This conclusion is consistent with the district court's opinion.

Furthermore, we conclude that there is insufficient evidence to find that the Agreement was entered into as a result of unlawful secondary pressure. The picketing has not been established as unlawful. In addition, the picket-

[11] *Los Angeles Building & Construction Trades Council (Donald Shriver, Inc.)*, 239 NLRB 264, 267-70 (1978), enfd. 635 F.2d 859, 872-876 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981); *A.L. Adams Construction Co. v. Georgia Power Co.*, 557 F.Supp. 168, 174-77 (1983), affd. 733 F.2d 853, 856-58 (11th Cir. 1984), cert. denied 471 U.S. 1075 (1985).

[12] *Plumbers Union Local 246 (Marlin Mechanical, Inc.)*, Case 32-CE-52 (1989).

[13] UCA contends that, under state law, Kaiser cannot lawfully employ employees to perform work on this site. However, the state agency, MWRA, has decided that the Employer can do so, and the Employer intends to do so. In these circumstances, we do not consider it within our province to rule on the state law question.

ing involved the MWRA, not the Employer. Moreover, none of the described activity was engaged in for the purpose of forcing the Employer or any other employer to enter into a "hot cargo" contract.

With respect to the surveyors, UCA asserts that the Employer's surveyors will not be covered by the Agreement. However, the fact is that they will be covered. The UCA's mistaken belief apparently stems from the fact that the Employer's professional engineers, who use surveyor equipment, are not covered by the Agreement. It does not appear that the "union-signatory" requirement extends to subcontractors wheo employ professional engineers.

Based on the above, we conclude that the instant charge should be dismissed, absent withdrawal.

H.J.D.

ROF-3
y:Kaiser lfa

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 87-38

ASSOCIATED BUILDERS AND CONTRACTORS OF KENTUCKIANA, INC. and RIVER CITY DEVELOPMENT CORPORATION,
Plaintiffs

v.

OHBAYASHI CORPORATION, *et al.*,
Defendants

ORDER

[Filed October 26, 1987]

This is an action in which the plaintiffs request that this Court avoid a Project Agreement between Ohbayashi Corporation and defendant labor unions. The grounds for avoidance are that the agreement is against public policy in the Commonwealth of Kentucky (Count I), that it interferes with the plaintiffs' reasonable future contractual relationships (Count II), and that, under color of state law, it deprives the plaintiffs of property rights in violation of the due process and equal protection rights guaranteed by the United States Constitution (Count III).

The complaint was originally filed in the Circuit Court of Scott County, Kentucky, and was later removed to this Court under 28 U.S.C. 1441 and 28 U.S.C. 1337. The action is currently before the Court on the motion to dismiss of Ohbayashi Corporation and of the defendant unions.

The factual background of this action involves the Commonwealth's inducement of Toyota Corporation to locate a major automobile assembly plant near Georgetown, Kentucky. The incentives proffered by Governor Martha Layne Collins' administration were approved by the Kentucky General Assembly in Senate Joint Resolution No. 7 signed by Governor Collins on February 24, 1986. In February, 1986, the Commonwealth and Toyota also signed an agreement formalizing their mutual commitments. This Toyota Agreement and the preamble to Senate Joint Resolution No. 7 contained general statements concerning the benefits to be derived by the citizens of Kentucky.

At about the same time that the state announced the advent of the Toyota plant in Kentucky, in December, 1985, Toyota announced that Ohbayashi Corporation would be the general manager of the plant construction in Scott County. Ohbayashi initially solicited bids on a merit shop basis, from both union and merit shop companies. River City Development Corporation bid successfully and obtained a contract as a subcontractor under Daniel Construction Company, a general contractor on the project.

Later, Ohbayashi entered into a Construction Project Agreement with the defendant unions which became effective on December 1, 1986. The Project Agreement recognized the defendant unions as the sole, exclusive bargaining agent for craft employees working on the project. (Article IV, Sec. 1.) It also mandated that all employees, with certain exceptions, should be hired through referral facilities maintained by the unions. *Id.*, Sec. 2. Additionally, "Qualified residents of the Commonwealth of Kentucky shall be preferred for employment without discrimination based upon membership of non-membership in a labor organization or upon race, color, creed, sex, or national origin." *Id.* at Sec. 2.B. The Project Agreement also included a grievance and arbitration mechanism and no strike/no lock-out provisions.

The Project Agreement affected only those contracts signed on or after December 1, 1986. Ohbayashi retained the right to choose any contractor whether or not the contractor was unionized. Any successful bidder, however, was obligated to sign the Project Agreement.

The plaintiffs allege that the hiring provision prevents them from following their normal business procedure. River City, a merit shop contractor, claims that since it cannot determine its own work force, it has been prevented from bidding to obtain further contracts on the Toyota project and would be unable to take advantage of the competitive edge it hoped to have established through its initial successful bid.

The defendants argue that this action should be dismissed on various grounds. First, they contend that the Project Agreement is consistent with state public policy and furthermore is preempted by federal labor law. Specifically, pre-hire agreements and hiring halls are sanctioned under Section 8(f), National Labor Relations Act, 29 U.S.C. § 158(f). Also, there was no tortious interference with the plaintiffs' reasonable expectations in that the plaintiffs' had only a unilateral hope of future contracts: River City's own inhibitions, and not anything in the Project Agreement, prevent its bidding on additional contracts; and the supposed interference not only was not improper but is sanctioned by federal labor law. Moreover, it is argued that there is no constitutional deprivation in that the Project Agreement involved no state action or protected property interest and is subject to only rational basis review.

Initially, the Court observes that the plaintiffs have apparently conceded the invalidity of their state policy argument as set forth in Count I of their complaint. The plaintiffs did not address this issue in their response to the defendants' motions to dismiss nor in their oral arguments before the Court. The defendants' arguments that there is no conflict between public policy as expressed in

Joint Senate Resolution No. 7 and the Toyota Agreement and the Construction Project Agreement appears well taken. As was pointed out in oral arguments, the number of merit shop contractors and the percentage of Kentuckians employed on the project have both increased since the Project Agreement went into effect.

The plaintiffs also did not defend their state tort claim in either their response memorandum to the motions to dismiss or in oral arguments—beyond arguing in the former that federal law does not preempt this claim. As the Court of Appeals of Kentucky observed in *Cullen v. Southeast Coal Co.*, 685 S.W.2d 187, 190 (Ky. Ct. App. 1978), the key to a description of tortious interference with a prospective contractual relation is "improper interference." This means that the interference must be accomplished by "fraud, deceit, or coercion," *Henkin, Inc. v. Bank & Trust Co.*, 566 S.W.2d 420, 425 (Ky. App. 1978), or by malice. *Cullen*, 685 S.W.2d at 190. Nothing in the plaintiffs' pleadings, memoranda, or oral arguments indicates that the Project Agreement involved such egregious conduct that would rise to the level of "improper interference."

River City is presently a subcontractor so it does not have a direct contractual relationship with Ohbayashi. Daniel Construction's "Request for Quotation," dated September 11, 1986, which was submitted by the plaintiff in their Supplement to the Record, indicates that work was to be done on "a Merit Shop Operations basis." River City's relation to Daniel has apparently remained undisturbed by this Project Agreement—except that change orders have increased River City's share of work on the project. Associated Builders and Contractors (ABC) never has had a contract on the project and indeed is the type of organization that does not bid on construction projects.

The plaintiffs have not directed our attention to any authority that would prevent Ohbayashi from changing

the grounds on which construction bids are to be solicited. *Cf. AGC v. Otter Tail Power Company*, 611 F.2d 684 (8th Cir. 1979); *NLRB v. Local 103, Iron Workers*, 434 U.S. 335 (1978). The plaintiffs had no right to expect a continuation of the initial bidding procedures and hiring process. Indeed, the plaintiffs, as astute businessmen, should have anticipated that unions would try to attempt to exert as much influence as possible on such a large scale project.

The Plaintiffs not only did not have a legitimate expectation that the whole project would remain on a traditional merit shop basis, but the Project Agreement does not interfere with River City's continuing right to bid on contracts. The Project Agreement specifically gives Ohbayashi "the absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or non-existence of any agreements between such bidder and any party to this Agreement. . . ." (Article II, Sec. 4.) Construction workers are to be considered for employment regardless of whether or not they have a union affiliation. Thus even after the Project Agreement went into operation, the basis for participation in the Toyota project remained closer to a merit shop basis than any other typical description. The main obstacle to River City's obtaining further work on the Toyota project seems to be its own reluctance to present itself as "willing ready and able to comply with this Project Agreement, should it be designated the successful bidder." *Id.*

Furthermore, no relief can be given on the plaintiffs' complaint. In their complaint as filed, the plaintiffs have only prayed that the contract be avoided. As of August 31, 1986, however, the project was 86% complete. Avoiding the contract would thus be meaningless. Amending the complaint to request monetary damages would offer no relief. River City has bid on no contracts since the advent of the Project Agreement. Thus monetary dam-

ages would be too speculative to calculate. ABC would, of course, not be entitled to monetary damages because ABC is not a contractor.

The plaintiffs' constitutional claim (Count III) is also subject to dismissal. In order to assert a denial of due process or equal protection, the plaintiffs' must establish that this denial was under color of state law. The state action must manifest itself as an integral aspect of the protested against action. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Graham v. NCAA*, 804 F. 2d 953 (6th Cir. 1986).

The Commonwealth of Kentucky was very much involved in inducing Toyota to construct an automotive assembly plant in Scott County, Kentucky. As part of this inducement the legislature pledged to enact measures to help "develop, staff, fund, support and maintain the program and incentives pledged to the Toyota Motor Corporation in return for its commitment to the economic development of the Commonwealth." (Senate Joint Resolution No. 7.) This state assistance included the acquisition of real estate, site improvements, highway improvements, employee recruitment and training, educational programs, and technical research. *Id.* The Agreement between Toyota and the Commonwealth further elaborated upon the precise extent and nature of this state involvement. The fact is there are few references in this agreement to labor relations and conditions for bidding on the project. The Agreement does say that it is the public policy of the state to provide employment opportunities for its residents and citizens. The state agreed to purchase a "Project Site" and to fund "Project Improvements." These "Project Improvements" involved general site preparations such as surveys, excavation, cemetery removal, etc., which were to be undertaken before the "Project Site" was conveyed in fee simple to Toyota. In regard to the "Project Improvements," the Commonwealth was "to cooperate with and assist Toyota

and Ohbayashi in connection with bidding procedures" and to "monitor construction and installation of the Project Improvements."

Toyota itself was to "construct, install and complete the Induced Facility at an estimated cost of approximately $800,000,000." The Project Agreement to which the plaintiffs object is between Ahbayashi and the Building and Construction Trades Department, AFL-CIO on behalf of its affiliated unions and their local unions. The Project Agreement applies to contractors on the "Induced Facility" and not on the "Project Improvements." It evinces no state involvement at all.

The Sixth Circuit Court of Appeals held in *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 958 (1986):

> [E]arlier cases were premised on the theory that indirect involvement by state governments could make conduct normally considered to be private action into state action. The Supreme Court rejected that theory, however, in *Rendell-Baker* [*v. Kohn*, 457 U.S. 991 (1982)] and *Blum* [*v. Yaretsky*, 457 U.S. 991 (1982)]. As the Fourth Circuit recognized in *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984), in order to conclude that the [defendants'] conduct is fairly attributable to the state it must be established either that (1) the [defendants were] serving a function which was traditionally and exclusively the state's prerogative, or (2) the state or its agencies caused, controlled or directed the [defendants'] action.

The establishment of bidding procedures and labor conditions for private construction projects is not traditionally a state function. And, although the state induced the Toyota project and envisions public benefits from it, the plaintiffs have indicated no state involvement in

the Project Agreement—either in its inception or in its execution.

The Court, being sufficiently advised, IT IS HEREIN ORDERED that:

(1) The Motion to Dismiss of defendant Ohbayashi and of defendant Unions is GRANTED;

(2) Defendant Ohbayashi Corporation's Motion for Clarification of the Court's Order Granting Plaintiffs' Motion for Leave to Supplement the Record or, in the Alternative, Defendant's Motion to Strike is DENIED;

(3) The Defendant Unions' Motion to Strike in Part is DENIED.

(4) This action is STRICKEN from the docket.

This 26 day of October, 1987.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.
Judge

Notice is hereby given of the entry of this order or judgment on October 27, 1987.

LESLIE G. WHIMER,
Clerk

By: [Illegible]

APPENDIX F

Vol. 13, ¶ 23061

MORRISON-KNUDSEN CO., INC.
NLRB Advice Memorandum

Case Nos. 26-CE-8, 26-CE-9, 26-CE-10, 26-CE-11, 26-CE-12, 26-CA-11428, 26-CA-11429

March 27, 1986

Index Nos. 584-1225-2500, 584-1225-6700, 584-3740-1700, 584-5000, 584-5014, 584-5028, 584-5042, 590-2500, 590-2550, 590-2500-5000

These cases were submitted for advice as to whether a prehire agreement is valid under Section 8(f) of the Act and whether certain clauses thereof are privileged by the construction industry proviso to Section 8(e).

FACTS

In the fall of 1985,[1] Morrison-Knudsen Company, Inc., (the Employer) was selected by The Saturn Corporation (Saturn) to be the construction manager for the construction of an automobile manufacturing facility in Spring Hill, Tennessee. The Employer then met with representatives of the Building and Construction Trades Department of the AFL-CIO as well as International and Local Unions (the Unions) to negotiate a project agreement for the site. On October 8, the Employer met with interested local contractors in Tennessee to dismuss the bidding process at the Saturn facility. The Employer told the contractors that, as construction manager, it would not be doing any job site work; rather, all the construction work was going to be contracted out. The Employer indicated that it would be acting as the agent of Saturn in administering construction activities at the site and

[1] All dates are in 1985, unless otherwise noted.

in subletting contracts, and that any employees it hired would be administrative, engineering, clerical, and guards. In addition, the Employer told the contractors present that there would be a project agreement covering work at the site. The execution contractors (contractors awarded a bid) would be required to sign this agreement. On October 16, the Employer wrote to the contractors, soliciting further information for the purpose of evaluating and "prequalifying" bidders for various phases of the project. Once again, the letter informed the contractors that the Spring Hill facility would be constructed under a project agreement and noted that "[i]f awarded a contract, you will be required to become signatory to this labor agreement," but that "this agreement does not exclude open or merit shop contractors from participating in this project."

On November 1 the Employer executed a project agreement (the Project Agreement) with the Unions. The Project Agreement applies only to construction work at the Spring Hill, Tennessee, site and binds all execution contractors to its terms. In addition, each execution contractor agrees to recognize the Unions as the sole and exclusive bargaining representatives for all craft employees on the project.

At the time the Project Agreement was executed, the Employer had hired no employees. However, it now appears that the Employer's present plans are to hire two carpenters for work on the jobsite, and it intends to hire more craft employees to perform a major portion of the excavation work on the job site.[2] The Employer contends that, based on past experience, it always expected that it would have to hire craft employees at some point during the construction project due to one or more of the following circumstances: a default by a subcontractor, an unsatisfactory or incomplete performance by a subcontractor, the receipt of uneconomical bids demonstrating that

[2] [*Ed. Note:* Footnote omitted by Div. of Advice.]

the Employer itself could perform the work more cheaply, minor jobs not worth bidding, clean-up work, and the avoidance of jurisdictional disputes. Indeed, the Project Agreement does not preclude the Employer from acting as an execution contractor. Thus, Section 5, which specifically excludes certain areas from the scope of the Agreement, excludes "[a]ll employees of the Construction Manager not performing manual labor," but does not exclude other construction employees of the Employer.

ACTION

It was concluded that the instant charges should be dismissed, absent withdrawal.

The Charging Party first argues that the Project Agreement is not a valid Section 8(f) agreement because the Employer will not employ craft employees at the Spring Hill job site. However, as noted above, the Employer has hired two carpenters at the jobsite and intends to hire more employees pursuant to its decision to become an execution contractor for excavation work at the site. These employees will be doing construction work and will be covered by the Project Agreement. The very nature of a Section 8(f) agreement means that the employer intends to hire craft employees to work on the job site at some time during project construction. In this regard, we would distinguish *Squillacote v. Racine Trades Council*, 483 F. Supp. 1218 (E.D. Wisconsin 1980), which indicated that a prehire agreement would be unlawful if the signatory employer (a general contractor) intended to hire only noncraft employees. The court noted in *Racine Tades Council* that the signatory's employees were not "employees whom [the unions] might represent in the future," 483 F. Supp. at 1222. Consequently, it could not be argued that the unions in that case had a representational interest in seeking a prehire agreement with the general contractor. By contrast, the Employer in the instant case does plan to hire employees whom the Unions traditionally represent and will represent.

The Charging Party also argues that the agreement is not valid under Section 8(f) because, it argues, the Employer is not engaged primarily in the construction industry. Board law makes it clear that if an employer's overall operations include a substantial amount of revenue from construction work, then the employer is "an employer engaged primarily in the building and construction industry" and is therefore qualified to enter into a Section 8(f) agreement. *Painters Local 1247 (Indio Paint and Rug Center)*, 156 NLRB 951, 960 (1966). Moreover, even if an employer is not generally engaged in the construction industry, it can nonetheless fall within Section 8(f) if it is engaged in construction work at a particular project. *Teamsters Local 83 (Stanley J. Matuszak*, NLRB 328, 331 (1979); *Zidell Explorations, Inc.*, 175 NLRB 887, 888-889 (1969). We have concluded that the Employer in the instant cases meets these standards. Not only is the Employer recognized nationally as major construction company, but with respect to the Saturn site the Employer will take an active role in the construction process. As construction manager, the Employer will oversee the general construction of the project, select or effectively recommend the selection of execution contractors, and perform construction work with its own craft employees. Accordingly, the Employer is an employer engaged primarily in the building and construction industry at the Saturn facility. It follows that Section 8(f) protects the agreement from illegality under Section 8(a)(2).

Finally, the Charging Party argues that the union signatory clause of the project agreement is not protected by the construction industry proviso to Section 8(e) because the Employer in the instant case is not "an employer in the construction industry," and the Project Agreement was not entered into within the context of a collective bargaining relationship. As to the former contention, the Charging Party argues that the Employer is not the real party of interest to the Project Agreement,

but that it executed that Agreement only as an agent of Saturn. Concededly, it appears that Saturn made the decision that the Spring Hill facility would be constructed pursuant to a project agreement and Saturn has the final authority as to which contractors will actually be awarded the project bids. However, the essential point is that the Employer, and not Saturn, is the signatory to the project agreement. The fact that the Employer may have entered into the agreement at the direction of Saturn does not alter the fact that the Employer is the signatory.

The Charging Party also argues that, even if the Employer is the actual signatory (which we believe it to be), there is no proviso protection because the Employer is not engaged in the construction industry. In our view, as discussed below, the Employer's role in regulating the labor relations at the job site is more than sufficient to invoke the protection of the construction industry proviso. The Employer is a major general constractor with construction contracts throughout the United States. Where, as here, an employer's principal business is in the construction industry, no further analysis is necessary in order to deem it to be "an employer in the construction industry" for purposes of Section 8(e). See *United Brotherhood of Carpenters and Joiners of America (Longs Drug Stores, Inc.)*, 278 NLRB No. 62, ALJD at 7-8 (1986). Under that test, the Employer is clearly engaged in the construction industry. Further, even if an employer's principal business is not in the construction industry, but it acts as its own general contractor on a specific construction project, the Board may nontheless find proviso protection, depending upon "the degree of control over the construction site labor relations it [the general contractor] elects to retain." *Carpenters (Longs Drug Stores, Inc.)*, supra, ALJD at 8. See also *Los Angeles Building and Construction Trades Council (Church's Fried Chicken)*, 183 NLRB 1032 (1970). Even under this analysis, the Employer herein has retained sufficient

control over labor relations at the job site to qualify for the Section 8(e) proviso. Thus, in the instant case, while it appears that Saturn ultimately determines who will be awarded the contracts at the site, the Employer is responsible for soliciting all bids and making recommendations to Saturn concerning who should be awarded those bids. In addition, the Employer is the signatory to the subcontracts with the execution contractors. It is ultimately responsible for the administration of the Project Agreement and for the performance of all its execution contractors on the job site. Under these circumstances, the Employer is clearly "an employer in the construction industry."

As to the contention that the agreement is not in the context of a collective bargaining relationship, we note that the construction industry proviso to Section 8(e) authorizes the negotiation of union signatory clauses by a union and construction industry employer in the context of a collective bargaining relationship. *Cornell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 633 (1975). A Section 8(f) prehire agreement voluntarily entered into satisfies this requirement. *Los Angeles Bldg. and Const. Trades Council (Donald Shriver, Inc.)*, 239 NLRB 264, 267-69 (1978), enf'd 635 F.2d 859, 872-876 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981). See also *A.L. Adams Construction Co. v. Georgia Power Co.*, 557 F. Supp. 168, 174-177 (1983); aff'd 733 F.2d 853, 856-858 (11th Cir. 1984), cert. denied 105 S. Ct. 2155 (1985). In the instant cases, we note that the Employer intends to hire construction employees, and intends to cover them with a collective bargaining agreement. Thus, the requirement of a collective bargaining relationship is satisfied.

Accordingly, the instant charges should be dismissed, absent withdrawal.

by Harold J. Datz,
Associate General Counsel
Division of Advice

APPENDIX G

NATIONAL LABOR RELATIONS BOARD

REGION 27

260 New Custom House, 721 Nineteenth Street

Denver, Colorado 80202

(303) 837-3551

April 16, 1982

Mr. Neil O. Andrus, Attorney
Musick, Peeler & Garrett
718 Seventeenth Street, Suit 1500
Denver, Colorado 80202

Re: International Union of Operating Engineers, Local 3
Case No. 27-CE-27, Utah Building & Construction Trades Council, et al. Case No. 27-CE-28

Dear Mr. Andrus:

The above-captioned cases, charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As a result of the investigations, it does not appear that further proceedings are warranted. The primary issues presented in the above-referenced cases are whether Deseret Generation and Transmission Cooperative is an employer in the construction industry and whether Forrest Concrete Pumping's work performed is done at the site of construction. The investigation reveals that Deseret is a non-profit corporation formed for the purpose of constructing and operating a coal-fired electricity generation plant located near Bonanza, Utah. The project is called the Moon Lake Project. Deseret has solicited bids and entered into over eighty prime contracts for the construction of the power plant. On the job site, Deseret employs three individuals: Bolen, the construction engi-

neer and construction department manager; Doyle, the civil engineer; and Cain, the loss control supervisor. Bolen's responsibilities include the coordination of all efforts of the prime contractors, as well as overseeing the construction of the power plant in conjunction with a consulting engineering firm.

On or about February 3, 1981, Deseret and its agent, Jelco Division of Townsend and Botlum, Inc., negotiated and entered into a project collective bargaining agreement, which was signed by approximately thirty unions. The project agreement contains, among other things, a provision which requires contractors and subcontractors, as they bid and are accepted for future work, to sign a letter of assent. The letter of assent requires them to recognize the appropriate construction union as the sole and exclusive bargaining representative of the project contractors' and subcontractors' employees and adhere to substantially all the terms of the applicable master construction agreement.

The Moon Lake Project construction site consists of approximately 2,000 acres. Due to the great quantities of concrete required in the construction of the power plant, its distance from any large population centers, and the very size of the site, a concrete batch plant was erected on the project itself. Construction is occurring throughout the entire work site, and the concrete batch plant is centrally located on that site.

On or about July 1, 1981, Deseret awarded Centric the work of erecting all substructures and foundations on the Moon Lake Project. On the same date, Centric signed the letter of assent. In performance of its work, Centric utilizes concrete which is prepared at the on-site concrete batch plant. That concrete batch plant is operated by Acme Readymix. When Centric is ready for concrete to be poured, it contacts Acme's on-site batch plant and arranges for a certain quantity of concrete to be delivered

to the point of the pour. The concrete is delivered by Acme's concrete trucks.

Forrest Concrete Pumping is a corporation engaged in the business of pumping readymix concrete from concrete delivery trucks to concrete forms on construction projects. Forrest has performed concrete pumping for various construction contractors on the Moon Lake Project, including the performance of services for Centric. Forrest gets concrete from Acme's on-site batch plant and delivers it to structures on the construction site. Forrest deals with the contractors on a will-call basis and has no written contract with Centric for its services, nor has Forrest signed a letter of assent pursuant to the project collective bargaining agreement.

In determining whether Deseret is an employer within the construction industry, I considered the fact that Deseret acts as its own general contractor, in that it solicits and signs contracts with prime contractors and oversees the construction of the Moon Lake Project through its construction engineer. Therefore, Deseret, as a general contractor, exercises control over the labor relations of the construction site and over the selection of contractors and subcontractors. It is immaterial, that Deseret is not doing any actual construction nor that its primary business once the Moon Lake Project is completed will be the operation of the power plant.

Accordingly, I have concluded that Deseret is an employer in the construction industry within the meaning of the construction industry proviso of 8(e).

It is also concluded that Forrest's delivery of concrete from the concrete batch plant that is centrally located on the construction site to various structures on the construction site is work done at the site of construction. The construction industry's exemption from 8(e) was based on Congressional appreciation of the close community of interest which exists among employees working on

a construction site and for the problems which would likely occur if union members were required to work alongside non-union people on the same project.[1] The proviso does not exempt secondary agreements relating to supplies and materials or other products shipped or otherwise transported to the delivery site of construction.[2] Therefore, the Board has consistently held that the delivery of readymix concrete from an off-site batch plant to the site of construction, where it is then poured, is not within the proviso, since the mixing and delivery of readymix concrete to construction sites is not construction work but is the delivery of a material or a product.[3] However, because Forrest employees deliver concrete from a concrete bath plant which is located in the heart of the construction site, making such deliveries to structures all over the construction site. Forrest's employees are on the construction site from start to finish while performing their work. This is a case in which Forrest's employees regularly work shoulder-to-shoulder with other construction site employees. For the foregoing reasons, it is concluded that Forrest's delivery of concrete is "work to be done at the site of . . . construction" within the meaning of the construction industry proviso.

In view of the foregoing, I am refusing to issue complaint in the above-captioned matters.

A review of this action may be obtained in accordance with the instructions contained in the attachments to this letter.

Very truly yours,

[1] *Robert E. Fulton*, 220 NLRB 530, 536 (1975).

[2] H. Conf. Rept. 1146, 86th Cong., 1st Sess., p. 39; II Leg. Hist. 943.

[3] *Inland Concrete Enterprises, Inc.*, 225 NLRB 209 (1976).

W. BRUCE GILLIS, JR.
W. Bruce Gillis, Jr.
Regional Director

Attachments

Certified Mail
Return Receipt Requested

cc: (Copies sent to parties listed on following page.)

cc: International Union of Operating Engineers, Local 3, 1958 West North Temple, Salt Lake City, Utah 84116
Forrest Concrete Pumping, Inc., 1630 Beck St., Salt Lake City, Utah 84116
Centric Corporation, 5490 W. 13th Avenue, Denver, Colorado
Deseret Generation and Transmission Cooperative, 8722 Smith 300 West, Sandy, Utah 84070
Utah Building & Construction Trades Council, 2261 South Redwood Road, West Valley City, Utah
International Association of Heat & Frost Insulators and Asbestos Workers, Local No. 69, 2261 South Redwood Road, West Valley City, Utah
United Brotherhood of Carpenters and Joiners of America, Local No. 184, 2261 South Redwood Road, West Valley City, Utah
International Brotherhood of Boilermakers, Iron Ship Buildings, Blacksmiths, Forgers and Helpers, Local 182, 150 East 700 South, Salt Lake City, Utah
International Brotherhood of Electical Workers, Local No. 354, 1164 South Main, Salt Lake City, Utah
International Union of Bricklayers and Allied Craftsmen, Local Nos. 1, 2, and 6, 2261 South Redwood Road, West Valley City, Utah
International Association of Bridge, Structural and and Ornamental Iron Workers, Local No. 27, 2261 South Redwood Road, West Valley City, Utah

Operative Plasterers' and Cement Masons' International Association, Local No. 68, 2261 South Redwood Road, West Valley City, Utah

Laborers' International Union of North America, Local No. 295, 2261 Couth Redwood Road, West Valley City, Utah

United Union of Roofers, Waterproofers and Allied Workers, Local No. 91, 2261 South Redwood Road, West Valley City, Utah

Sheet Metal Workers' International Association, Local No. 312, 2261 South Redwood Road, West Valley City, Utah

International Brotherhood of Painters and Allied Trades, Local No. 77, 360 West 1600 South, Salt Lake City, Utah

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 57, 2261 South Redwood Road, West Valley City, Utah

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222, 2621 South 3270 West, West Valley City, Utah

Building and Construction Trades Department, AFL-CIO, AFL-CIO Building, 815 - 16th Street, N.W., Washington, D.C. 20006

International Association of Heat & Frost Insulators and Asbestos Workers, 505 Machinists Building, 1300 Connecticut Avenue, N.W., Washington, D.C. 20036

United Brotherhood of Carpenters and Joiners of America, 101 Constitution Avenue, N.W., Washington, D.C. 20001

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmith, Forgers and Helpers, New Brotherhood Building, 8th Street at State Avenue, Kansas City, Kansas 66101

International Brotherhood of Electical Workers, 1125 15th Street, N.W., Washington, D.C. 20005

International Union of Bricklayers and Allied Craftsmen, 815 15th Street, N.W., 20005

International Association of Brudge, Structural and Ornamental Iron Workers, 1740 New York Avenue, N.W., Suite 400, Washington, D.C. 20006

Operative Plasters' and Cement Masons' International Association, 1125 - 17th St., N.W., Washington, D.C. 20036

Laborers' International Union of North America, 905 16th Street, N.W., Washington, D.C. 20036

United Union of Roofers, Waterproofers and Allied Workers, 1125 17th Street, N.W., Washington, D.C. 20036

Sheetmetal Workers' International Association, 1750 New York Avenue, N.W., Washington, D.C. 20036

International Brotherhood of Painters and Allied Trades, 360 West 1600 South, Salt Lake City, Utah

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, 901 Massachusetts Avenue, N.W., Washington, D.C. 20001

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 25 Lousiana Avenue, N.W., Washington, D.C. 20001

General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570

APPENDIX H

UNITED STATES CONSTITUTION,
Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

29 USC § 152(2)

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 USC § 158(e)

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcib'e and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor or-

ganization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 158(f)

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement re-

quires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.